Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

JAMES A. LAW, individually and as Executor of the Estate of JANICE C. LAW and JAMES A. LAW,
Petitioner,

v.

WALTER A. CAMP, MD, BRUCE L. WARWICK, FRANK A. CORVINO, MITCHELL KLINE, WEI-NCHIH LEE, GREENWICH HOSPITAL, FRANCIS X. WALSH, MD, ARTHUR ROSENBERG, JAMES BRUNETTI and DICKERMAN HOLLISTER, JR., MD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTION PRESENTED

Whether Connecticut General Statute Section 19a-571 permits intentional hastening of a patient's death, which is involuntary euthanasia or physician-committed homicide, and whether such practice violated Janice C. Law's constitutionally protected right to life?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the opinion and summary order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The District Court of the District of Connecticut (per Nevas D.J.) granting respondents' summary judgment motions is published at *Law v. Camp, 116 F.Supp.2d 295 (D.Conn. 2000)* and set forth in the Appendix hereto (App. 8a – 35a)

The opinion of the United States Court of Appeals for the Second Circuit is unreported and set forth in the Appendix hereto (App. 1a – 7a)

The decision of the United States Court of Appeals for the Second Circuit denying petitioners' motion for rehearing en banc was denied on October 5, 2001 is unreported and set forth in the Appendix hereto (App. 36a)

BASIS FOR JURISDICTION

The United States Court of Appeals for the Second Circuit entered its opinion and order on July 27, 2001 and denied rehearing and rehearing en banc on October 5, 2001. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

Section 28 U.S.C. Section 2403(b) may apply and neither the District Court nor the Second Circuit certified to the State of Connecticut Attorney General that the

constitutionality of Connecticut General Statutes Section 19a-570 et seq. and Section 19a-504a was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State of Connecticut General Statutes Section 19a-571:

Liability re removal of life support system of incapacitated patient. Consideration of wishes of patient (a) Subject to the provisions of subsection (c) of this section, any physician licensed under chapter 370 or any licensed medical facility who or which withholds, removes or causes the removal of a life support system of an incapacitated patient shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding for such withholding or removal, provided (1) the decision to withhold or remove such life support system is based on the best medical judgment of the attending physician in accordance with the usual and customary standards of medical practice; (2) the attending physician deems the patient to be in a terminal condition or, in consultation with a physician qualified to make a neurological diagnosis who has examined the patient, deems the patient to be permanently unconscious; and (3) the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems. In the determination of the wishes of the patient, the attending physician shall

consider the wishes as expressed by a document executed in accordance with section 19a-575 and 19a-575a, if any such document is presented to, or in the possession of, the attending physician at the time the decision to withhold or terminate a life support system is made. If the wishes of the patient have not been expressed in a living will the attending physician shall determine the wishes of the patient by consulting any statement made by the patient directly to the attending physician and, if available, the patient's health care agent, the patient's next of kin, the patient's legal guardian or conservator, if any, and any other person to whom the patient has communicated his wishes, if the attending physician has knowledge of such person. All persons acting on behalf of the patient shall act in good faith. If the attending physician does not deem the incapacitated patient to be in a terminal condition or permanently unconscious, beneficial medical treatment including nutrition and hydration must be provided. (b) A physician qualified to make a neurological diagnosis who is consulted by the attending physician pursuant to subdivision (2) of subsection (a) shall not be liable for damages or subject to criminal prosecution for any determination made in accordance with the usual and customary standards of medical practice. (c) In the case of an infant, as defined in 45 CFR 1340.15(b), the physician or licensed medical facility shall comply with the provisions of CFR 1340.15(b)(2) in addition to the provisions of subsection (a) of this section.

State of Connecticut General Statutes Section 19a-504a:

Continuation or removal of life support system. Determination of death (a) For the purpose of this section, "life support system" means any mechanical or electronic device utilized by any medical facility in order to replace, assist or supplement the function of any human vital organ or combination of organs. (b) For the purposes of making a determination concerning the continuation or removal of any life support system in a general hospital licensed under

section 19a-491, an individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all function of the entire brain, including the brain stem, is dead. Determination of death shall be made in accordance with accepted medical standards.

STATEMENT OF THE CASE

On October 26, 1994 Janice C. Law was seen by her internist Dr. Walsh at his office. She had a low-grade fever and an elevated blood glucose level. Dr. Walsh decided to hospitalize her to control her diabetes and to evaluate the cause of her fever. At approximately 1:00 pm on October 26, 1994 Janice Law walked into the Greenwich Hospital emergency room. She was diagnosed with a urinary tract infection and elevated blood sugar. She was treated in the emergency room with intravenous saline, insulin and acetaminophen. Dr. Walsh admitted Janice Law to Greenwich Hospital for treatment of the infection, to locate the source of the infection and to treat for sepsis. Janice Law was started on Unasyn, a broad based antibiotic, and insulin.

Dr. Walsh was leaving town for a medical convention that day and placed Dickerman Hollister, Jr., MD in charge of the care of Janice C. Law.

At 7:45 am on October 27, 1994 Janice Law suffered respiratory arrest and at 7:48 am she suffered cardiac arrest. She was resuscitated, intubated and placed on a mechanical ventilator (life support). She was transferred to the ICU unit in Greenwich Hospital and was in a coma.

Dr. Camp, a neurologist, at Greenwich Hospital was called in for a neurological consultation on the morning of October 27, 1994.

Janice Law remained in the coma and on life support. On the afternoon of October 28, 1994 Dr. Camp met with Janice Law's family. During this meeting, the Law family states Dr. Camp told them that Janice Law was brain dead. Dr. Camp denies he told the Law family that Mrs. Law was brain dead. The Law family states that the decision to remove life support was based on the family's belief that she was brain dead.

At 5:52 pm on October 28, 1994 Janice Law was removed from the mechanical ventilator (life support). At 6:15 pm Janice Law died. She was pronounced dead by Dr. Rosenberg who signed the death certificate. The State of Connecticut official death certificate certifies the time of her death as 6:15 pm on October 28, 1994.

On October 23, 1996, in the District Court of the State of Connecticut James Law filed two separate lawsuits, one alleging medical malpractice with a wrongful death component and the other alleging fraud. The basis of Jurisdiction was pursuant to 28 U.S.C. Section 1332(a)(1) diversity of citizenship. The two actions were consolidated in the District Court. James Law moved for summary judgment in the fraud action and partial summary judgment in the malpractice action. The defendants moved for summary judgment in both the fraud and malpractice actions. James Law's motions for summary judgment were denied. The defendants' motions for summary judgment were granted.

In the District Court's opinion the Court found:

> "Mrs. Law did not have a living will, health care proxy or other notation regarding her wishes as to life support, and she had never expressed her wishes on this issue to her family or her physicians." (App. 14a)

"Mrs. Law was intubated and placed on a mechanical ventilator (life support)." (App. 13a)
"At 5:52 p.m. Mrs. Law was removed from the mechanical ventilator." (App. 14a)
"At 6:15 p.m. Mrs. Law died. She was pronounced dead by Dr. Rosenberg," (App. 14a)

The District Court's opinion was appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed the District Court's opinion. A petition for rehearing en banc was filed which was denied October 5, 2001.

REASONS FOR GRANTING THE WRIT

The question presented in this case is whether Connecticut General Statute Section 19a-571 permits intentional hastening of a patient's death, which is involuntary euthanasia or physician-committed homicide, and whether such practice violated Janice C. Law's constitutionally protected right to life.

The petition should be granted because the Second Circuit's opinion and summary order, which affirmed the opinion and judgment of the District Court, as a practical matter, sets a national rule that eliminates the need for physicians and hospitals to abide by the statutory requisites of removal of life support statutes. This opinion and summary order has paved the way of involuntary euthanasia or physician-committed homicide – review should be granted to prevent this nationwide harm that will be applied well beyond the individual parties to this case.

Dr. Hollister, the attending physician, in an affidavit stated: "Removal of the mechanical ventilator and the

placement of Mrs. Law on patient-assisted ventilation was accomplished in accordance with Connecticut General Statutes Section 19a-570 et seq. ('Removal of Life Support System')." Dr. Hollister's attorney in his appellate brief stated: "Mrs. Law had been rendered in a terminal condition by hypoxic encephalopathy suffered as a result of a cardiorespiratory arrest. She would have died from the condition. The removal of life support here only hastened a result that was, by anyone's measure, inevitable.".

Mrs. Law's removal from life support under section 19a-570 et seq. had nothing to do with exercising her right to refuse unwanted medical treatment because "Mrs. Law did not have a living will, health care proxy or other notation regarding her wishes as to life support, and she had never expressed her wishes on this issue to her family or her physicians." *Law v. Camp, 116 F.Supp.2d 295 (D.Conn. 2000)* (App. 14a). The statutory requisites of Section 19a-571 were not met because they require "the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support." *Connecticut General Statute Section 19a-571.* The intent of Mrs. Law's removal from life support was to hasten her death and "In the eyes of the criminal law, if a person hastens death, such a person is considered the cause of the death," *State v. Mally, 366 P.2d 868.*

Notwithstanding this overwhelming admission to the cause of death being the intentional hastening of death, for the second time in five years the Second Circuit failed to make the distinction between hastening death and letting die as it had first done *in Quill v. Vacco, 80 F.3d 716 (2nd Cir. 1996)* which this court reversed in *Vacco v. Quill, 117 S. Ct. 2293, 138 L.Ed.2d 834 (1997)* and stated "The law has long used the actors' intent or purpose to distinguish between two acts that may have the same result.".

As will be seen, the Second Circuit's failure to make this critical distinction between letting a person die and making a person die infected its analysis, contributed to its misplaced reliance on the erroneous District Court's opinion which failed to determine that the physicians and hospital made Mrs. Law die and led directly to its ultimate erroneous conclusion. The conflicts with *Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990)* and *Vacco v. Quill,* 117 *S.Ct. 2293, 138 L.Ed.2d (1997)* created by the Second Circuit's failure to act on the intent of the removal of life support resulted in the final slide to involuntary euthanasia or physician-committed homicide. This involves an issue of such exceptional and profound nationwide importance, it can only be resolved – indeed, must be resolved – by the final authoritative voice of this Court.

I. Certiorari is Warranted Because the Decision Below Conflicts With Decisions of This Court

The conflicts are created because the United States Supreme Court cases of *Cruzan v. Director, Missouri Dept. of Health* and *Vacco v. Quill* both address the power of a state to regulate the removal of life support statutes to protect both an individual's right to liberty/refusal of unwanted medical treatment and right to life.

In *Cruzan v. Director, Missouri Dept. of Public Health, 497 U.S. 261 (1990)*, this Court stated:

> "[W]e assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition"

But at the same time recognized:

> "Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a

> general matter the states indeed all civilized nations demonstrate their commitment to life by treating homicide as a serious crime."

In *Vacco v. Quill, 117 S.Ct. 2293, 138 L.Ed.2d (1997)* this court stated:

> "[T]he state has neither endorsed a general right to 'hasten death' nor approved physician assisted suicide. Quite the opposite: The State has reaffirmed the line between 'killing' and 'letting die.' ... New York's reasons for recognizing and acting on this distinction – including prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians role as their patients' healers; protecting vulnerable people from indifference and financial pressure to end their lives; and avoiding a possible slide towards euthanasia"

Plainly, the majority in *Cruzan* had no difficulty at all distinguishing the right to refuse life-sustaining treatment, on the one hand, and the right to the protection from homicide on the other.

Furthermore this Court in *Vacco v. Quill* had no difficulty in distinguishing between killing and letting die in context of the removal of life support.

II. Certiorari Should Be Granted To Reaffirm The Protections Under The 14th Amendment To The United States Constitution

Certiorari should be granted because the issue in this case involves the triad between the United States Constitution, Mrs. Law and the State of Connecticut. The

United States Constitution grants to Mrs. Law protection from the deprivation of the fundamental rights of life and liberty:

> "the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment." *Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990)*

Additionally the United States Constitution grants to the State of Connecticut the power and responsibility to establish due process of law as it applies to deprivation of life or liberty:

> "... that no State shall deprive any person of life, liberty, or property without due process of law" *14th Amendment, U.S. Constitution*

The State of Connecticut codified statutes to complete this triad. The statute codified pertinent to this issue is Section 19a-571 which is part of the removal of life support statutes, Connecticut General Statutes Section 19a-570 et seq.

The question here is whether these statutes balanced the rights of Mrs. Law to life and at the same time to a liberty interest in refusing unwanted medical treatment. If the statutes do not have this balance they are unconstitutional since they do not protect both rights.

The Second Circuit affirming the District Court's opinion, already flawed by its improper insertion of quality-of-life considerations into its analysis, was used to discount the State's interest in the protection and preservation of human life. Such quality-of-life considerations are directly contrary to this Court's holding in *Cruzan* that:

> "We think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." *Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990)*

The dangers inherent in using such quality-of-life considerations are well recognized.

> "Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives." *Cruzan v. Harmon, 760 S.W.2d 408, 420 (Mo. Banc 1988), aff'd sub nom. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990).*

Such an analysis also disregards the irrefutable principle that all lives from beginning to end and irrespective of physical or mental condition, are under the full protection of the law.

> "The life of those to whom life has become a burden of those who are hopelessly diseased or fatally wounded - nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in full tide of life's enjoyment and anxious to continue to live." *Cruzan v. Director, Missouri Dept of Health, 497 U.S. 261, 295 (1990), (Scalia, J., concurring), citing Blackburn v. State, 23 Ohio St. 146, 163 (1873)*

III. Certiorari Should be Granted To Reaffirm The Essential Role Of The States In Our Federal System And The Power Of The People To Directly Govern Their Own Affairs

With the ever-increasing ability of medical science to prolong life, even in the face of what would otherwise be terminal illness, the States have had to strike a balance between the rights of the individual and the demands of organized society. That balance is grounded in the States' recognition of their responsibility to protect both individual rights and, at the same time, the lives of those who wish to live no matter what the circumstances. In striking that balance, the States have drawn a line between an individual's right to be let alone, on one hand, and intentionally killing on the other. That balance, now a national consensus, is represented by statutes in a majority of states which both codify an individual's right to refuse unwanted medical treatment and, in the same legislation, reject any affirmative act to end life. In the State of Connecticut these statutes are Connecticut General Statutes Section 19a-570 et seq. In 1989 the Supreme Court of the State of Connecticut in the case of *McConnell v. Beverly Enterprises-Conn. 209 Conn. 692, 553 A.2d 596* stated:

> "We turn to the terms of the Removal of Life Support Systems Act, General Statutes Sections 19a-570 to 19a-575, in which the legislature, cognizant of a common law right to self-determination and of a constitutional right to privacy, sought to provide a statutory mechanism to implement these important rights."
>
> "When the legislature has attempted to respond to this urgent request for statutory assistance, we have an obligation to pursue the applicability of statutory criteria before

> resorting to an exploration of residual common law right, if any such rights indeed remain."
>
> "Careful examination of our act discloses that the legislature approached the appropriate treatment for very sick patients by establishing three guiding principles. ... if a patient, to the contrary, is deemed by his or her physician to be in a terminal condition, life sustaining technology may be removed, in the exercise of the physician's best medical judgment, when the judgment has received the informed consent of the patient's next of kin or guardian and when it coincides with the expressed wishes of the patient. General Statutes Section 19a-571."

Connecticut General Statute Section 19a-571 has been amended in 1991 (since the *McConnell* case) and eliminated the requirement of:

> "the attending physician has obtained the informed consent of the next of kin, if known, or legal guardian, if any, of the patient prior to removal;"

When applying the wording of the *McConnell* case in 1994 this section would be read as follows:

> If a patient, to the contrary, is deemed by his or her physician to be in a terminal condition, life sustaining technology may be removed, in the exercise of the physician's best medical judgment, when it coincides with the expressed wishes of the patient.

The failure of the District Court and the Second Circuit in misapplying the law of the State of Connecticut has effectively changed the law of the State into allowing physicians and hospitals to bypass the consent of the patient and to commit involuntary euthanasia or physician-committed homicide on patients. These courts have taken away the role of the State and its legislature to make these changes, assuming change is appropriate.

> "We believe that policy dictates that we err on the side of preserving life. If there is to be a change in that policy, it must come from the people through their elected representatives. Broad policy questions bearing on life and death issues are more properly addressed by representative assemblies. These have vast fact and opinion gathering and synthesizing powers unavailable to courts; the exercise of these powers is particularly appropriate where issues invoke the concerns of medicine, ethics, morality, philosophy, theology, and law. Assuming change is appropriate, this issue demands a comprehensive resolution which courts cannot provide." *Cruzan v. Harmon, 760 S.W.2d 408, 426 (Mo. Banc 1988), aff'd sub nom. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990)*

The centerpiece of the erroneous decision is created by the misinterpretation of Connecticut General Statute Section 19a-571. Section 19a-571 was interpreted by the District Court as follows:

> "There is also nothing to support negligence per se under Conn.Gen.Stat. Section 19a-571. The only logical construction of this statute is that it was enacted to implement a terminal

> patient's common law rights to self determination and privacy, see *McConnell v. Beverly Enterprises-Conn., Inc., 209 Conn. 692, 553 A.2d 596 (1989)*, and, by its express terms, to provide a safe harbor for physicians by insulating them from civil and criminal liability for discontinuing life support measures under certain specified circumstances. There is no merit to Law's contention that the court should apply the inferential maxim 'expressio unius est exclusio alterius' which allows an inference that, where a statute identifies lawful behavior, by exclusion it identifies what is unlawful." *Law v. Camp, 116 F.Supp.2d 295 (D.Conn. 2000)* (App. 34a).

The District Court grossly misinterprets Connecticut General Statute 19a-571. The title of the statute is: "Liability re removal of life support system of incapacitated patient. Consideration of wishes of patient", *Connecticut General Statutes Section 19a-571.* The statute clearly provides that liability must be imposed. The only exception where liability is not imposed is where the expressed wishes of the patient on the removal of life support have been considered. The District Court failed to apply its finding of fact that: "Mrs. Law did not have a living will, health care proxy or other notation regarding her wishes as to life support, and she had never expressed her wishes on this issue to her family or her physicians." *Law v. Camp, 116 F.Supp.2d 295 (D.Conn. 2000)* (App. 14a) to evaluate whether or not the "certain specified circumstances" had been adhered to by the physicians and hospital prior to Mrs. Law being removed from life support. Without the expressed wishes of the patient, on the removal of life support, there is no informed consent to the removal of life support. The removal of life support therefore becomes an action of the physicians and the

hospital without the patient's consent. The removal of life support from Janice Law was the unlawful taking of another person's life, - put another way homicide. The State of Connecticut has always treated homicide as a serious crime and its civil equivalent is wrongful death. The legislature clearly uses the words liable for damages in any civil action or subject to prosecution in any criminal proceeding in enacting this law. The legislature has distinguished between the right to refuse life-sustaining treatment on the one hand and homicide on the other.

The conflict between the 14th Amendment to the United States Constitution, the case of *Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990)* and *Vacco v. Quill, 117 S. Ct. 2293, 138 L.Ed.2d 834 (1997)* on the one hand and *Law v. Camp, 116 F. Supp.2d 295 (D.Conn. 2000)* on the other is unquestionably the misinterpretation of Connecticut General Statutes Section 19a-571.

If allowed to stand, the Second Circuit's opinion and summary order affirming the District Court's opinion and judgment in *Law v. Camp, 116 F. Supp.2d 295 (D.Conn. 2000)* will effectively extinguish the power of States to continue to legislate the right to refuse unwanted medical treatment and the right to the protection of life and permit involuntary euthanasia or physician-committed homicide. This is an issue that arguably will affect more lives than any other issue the States will face in the foreseeable future.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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(Any footnotes trail end of each document)
00-9031

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES A. LAW, individually and as Executor of the Estate of Janice C. Law and JAMES A. LAW,
Plaintiff-Appellant,

-v.-

WALTER A. CAMP, MD, BRUCE L. WARWICK, FRANK A. CORVINO, MITCHELL KLINE, WEI-NCHIH LEE, GREENWICH HOSPITAL, FRANCIS X. WALSH, MD, ARTHUR ROSENBERG, JAMES BRUNETTI,
Consolidated-Defendants-Appellees,

DICKERMAN HOLLISTER, JR., MD,
Defendant-Appellee,

HARVEY SEIDENSTEIN and KEVIN E. CONBOY,
Consolidated-Defendants.

July 27, 2001, Decided

NOTICE:
RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY:
Appeal from the United States District Court for the District of Connecticut (Nevas, J.).

DISPOSITION:
AFFIRMED.

COUNSEL:
APPEARING FOR APPELLANT: Robert H. Law, III, Armonk, NY.

APPEARING FOR APPELLEE CAMP: Janine M. Kelly, Ryan, Ryan Johnson & Deluca, Stamford, CT (Charles A. Deluca, on the brief).

APPEARING FOR APPELLEES WARWICK, LEE, BRUNETTI, KLINE, CORVINO and GREENWICH HOSPITAL: Richard A. O'Connor, O'Brien, Tanski & Young, Hartford, CT.

APPEARING FOR APPELLEE WALSH: Louis B. Blumenfeld, Cooney, Scully & Dowling, Hartford, CT (William J. Wenzel, Pullman & Comley, L.L.C., Bridgeport, CT, on the brief).

APPEARING FOR APPELLEE ROSENBERG: Suzannah K. Nigro, Williams, Cooney & Sheehy, L.L.P., Bridgeport, CT (Ronald D. Williams, Jr., on the brief).

APPEARING FOR APPELLEE HOLLISTER: Eric J. Stockman, Neubert, Pepe & Monteith, New Haven, CT.

JUDGES:
PRESENT: HON. DENNIS JACOBS, HON. FRED I. PARKER, HON. SONIA SOTOMAYOR, Circuit Judges.

OPINION:

SUMMARY ORDER

Plaintiff-appellant James A. Law (individually and as executor of the estate of Janice C. Law, his mother, and James C. Law, his father) appeals from the judgment of the United States District Court for the District of Connecticut (Nevas, J.) granting summary judgment in favor of defendants-appellees. Janice Law suffered cardiopulmonary arrest after being admitted to defendant Greenwich Hospital ("Hospital") and was later removed from life support at the Hospital after her family's consultations with various doctors. The remaining defendants are the Hospital's corporate officers (Frank Corvino, CEO and President of the Hospital, and Bruce Warwick, Chairman of the Hospital's Board of Trustees), and doctors who were involved in some way with the treatment of Mrs. Law or her removal from life support.

Law alleged malpractice and corporate negligence in connection with Mrs. Law's death. Law separately sued defendants-appellees Camp and Hollister for fraud, claiming that Camp falsely informed him that his mother was brain dead when she was not, and that Hollister should have disclosed to him that his mother was not brain dead before Law, acting in reliance, consented to the termination of life support. The fraud and malpractice actions were subsequently consolidated in the district court.

Law moved for summary judgment in the fraud action, which was denied on the ground that there were material issues of fact as to the substance of the statements allegedly made by Camp to the Law family. Law subsequently moved for partial summary judgment in the malpractice action, arguing that the conduct of Greenwich Hospital, Corvino, Warwick, Brunetti, Kline and Lee (collectively the "Hospital Defendants"), as well as Camp and Hollister, amounted to negligence per se. The defendants cross-moved for summary

judgment as to all claims. On July 26, 2000, the district court denied Law's motion for partial summary judgment and granted summary judgment in favor of the defendants as to all claims.

On appeal, Law argues chiefly that the defendants violated Connecticut statutes governing the removal of life support and deviated from the Hospital's protocol for determination of brain death, that defendants' conduct was negligence per se because the state statutes and the Hospital policy codify the applicable standard of care, and that this negligence was the proximate cause of Janice Law's death. Law makes the following additional arguments on appeal: (1) the removal of life support was a violation of the Fourteenth Amendment; (2) the district court erred in refusing to grant plaintiff Law's third motion to extend the time to disclose expert witnesses (thereby precluding Law's use of Dr. Jay B. Krasner and Dr. William S. Maxfield as expert witnesses); (3) the district court's grant of summary judgment in favor of defendants-appellees Camp and Hollister on the fraud claims was erroneous because the court had previously denied a similar motion on the ground that there were disputed issues of material fact; and (4) material issues of fact remained as to whether the Hospital Corporate Defendants violated Connecticut Regulations regarding informed consent.

Assuming Law's Fourteenth Amendment claim is preserved on appeal, we conclude that it is meritless because Law has failed to offer evidence sufficient to demonstrate state action. See *Kia P. v. McIntyre, 235 F.3d 749, 755-56 (2d Cir. 2000)* (holding misdeeds of private hospital in the provision of medical care is not state action for purposes of *42 U.S.C. § 1983); Okunieff v. Rosenberg, 166 F.3d 507, 507 (2d Cir. 1999)* (per curiam) (affirming district court's holding that involuntary commitment by private hospital and physicians pursuant to state statute does not convert conduct into state action for purposes of § 1983).

It was not an abuse of discretion for the district court to preclude the testimony of expert witnesses who were untimely designated. See *Goetz v. Crosson, 41 F.3d 800, 805 (2d Cir. 1994)* ("A district court abuses its discretion 'when the [discovery ruling] was improvident and affected the substantial rights of the parties.'" (quoting *In re Surety Ass'n of Am., 388 F.2d 412, 414 (2d Cir. 1967))).* In determining whether an abuse of discretion has occurred, this Court considers: "(1) the party's explanation for the failure to comply with the discovery order; (2) the importance of the testimony of the precluded witness; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the testimony; and (4) the possibility of a continuance." *Softel, Inc. v. Dragon Med. and Scientific Communications, Inc., 118 F.3d 955, 961 (2d Cir. 1997);* see also *Outley v. City of New York, 837 F.2d 587, 590-91 (2d Cir. 1988).*

Here, Law had almost four years between the date of the death (October 28, 1994) and the initial deadline for disclosure of experts (May 1, 1998). He nonetheless asked for--and was granted--two extensions by the district court, the first to October 1, 1998 and the second to December 15, 1998. Law's second motion for an extension was itself untimely filed on October 21, 1998--three weeks after the first extended deadline had expired. The district court nevertheless granted the second extension, recognizing that, under Connecticut law, expert testimony is essential to pursue a malpractice claim. Law has failed to offer an adequate explanation for failing to comply with the district court's final deadline of December 15, 1998.

Defendants would have been prejudiced by yet another extension. They would have had to brief their objections yet again and defendants had already been delayed in preparing a defense as a result of Law's failure to disclose any experts by the first two deadlines. Because the success of malpractice claims in Connecticut depends on expert testimony, the defendants could not assess the strength of their case until

Law's experts were disclosed and deposed. The defendants had been preparing their case since December 15, 1998 on the reasonable assumption that Dr. Arthur Kaufman and Dr. S. Murphy Vishnubhakat were Law's only expert witnesses.

Law repeatedly ignored the deadlines set by the district court and refused to accept a fixed discovery schedule. It was not an abuse of discretion for the district court to determine that Law had sufficient time to disclose his experts and--having failed to meet the most recent court-imposed deadline--preclude him from disclosing additional expert testimony.

We affirm the district court's denial of Law's motion for partial summary judgment and grant of the defendants' motion for summary judgment on the malpractice and corporate negligence claims for substantially the reasons stated in Judge Nevas' thorough opinion. See *Law v. Camp, 116 F. Supp. 2d 295 (D. Conn. 2000).* As to the fraud claims, however, we affirm the grant of summary judgment in favor of defendants Camp and Hollister on the ground that Law has failed to provide expert testimony to demonstrate that Mrs. Law was not brain dead when life support was removed. See *Law, 116 F. Supp. 2d at 308.* We decline to affirm on the alternative basis (cited by the district court) that Law failed to provide expert testimony "that [the] removal [of life support] was the proximate cause of Mrs. Law's death", id., because we believe that the district court's formulation focuses on the wrong injury. The injury Law alleges in connection with the fraud is not Janice Law's death, but the emotional and psychological injury he himself experienced by consenting to the removal of life support under the alleged misapprehension that his mother was brain dead. Because summary judgment is supported on other grounds, it is unnecessary for this Court to consider whether Connecticut fraud law protects against this type of emotional injury or whether Law has adduced expert testimony to support a

causal connection between his own injury and the alleged fraud.

For the reasons set forth above, the judgment is hereby **AFFIRMED**.

Civil No. 3:96cv2147(AHN), Civil. No. 3:96cv2148(AHN)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JAMES A. LAW

v.

WALTER A. CAMP, MD AND DICKERMAN HOLLISTER JR., MD; JAMES A. LAW, EXECUTOR OF THE ESTATE OF JANICE C. LAW AND JAMES A. LAW

v.

GREENWICH HOSPITAL, ET AL.

July 26, 2000, Decided

DISPOSITION:
Law's motion DENIED. Motions of Hospital Defendants, Dr. Camp, Dr. Hollister, Dr. Walsh and Dr. Rosenberg GRANTED.

COUNSEL:
For JAMES A. LAW, plaintiff: Robert H. Law, III, Armonk, NY.

For WALTER A. CAMP, defendant: Janine M. Kelly, Brock Thomas Dubin, Ryan, Ryan, Johnson, McCaghey & Deluca, Stamford, CT.

For DICKERMAN HOLLISTER, JR., defendant: Michael D. Neubert, Peter T. Fay, Eric J. Stockman, Neubert, Pepe & Monteith, New Haven, CT.

For WALTER A. CAMP, consolidated defendant: Daniel E. Ryan, III, Ryan, Ryan, Johnson, McCaghey & Deluca, Stamford, CT.

For BRUCE L. WARWICK, FRANK A. CORVINO, MITCHELL KLINE, WEI-NCHIH LEE, JAMES BRUNETTI, GREENWICH HOSPITAL, consolidated defendants: Richard A. O'Connor, Robert Dennis Silva, Kathleen M. Nevins, O'Brien, Tanski, Tanzer & Young, Hartford, CT.

For FRANCIS X. WALSH, consolidated defendant: William J. Wenzel, Matthew P. Lundy, Pullman & Comley, Bridgeport, CT.

For ARTHUR ROSENBERG, consolidated defendant: Ronald D. Williams, Jr., Williams, Cooney & Sheehy, Bridgeport, CT.

JUDGES:
Alan H. Nevas, United States District Judge.

OPINION BY:
Alan H. Nevas

OPINION:

RULING ON MOTIONS FOR SUMMARY JUDGMENT

These two consolidated actions arise out of the hospitalization and subsequent death of Janice C. Law ("Mrs. Law"). The first, 3:96cv2147(AHN), is a fraud action brought by James A. Law ("Law"), Mrs. Law's son, individually against Walter A. Camp, M.D. ("Camp") and Dickerman Hollister Jr, M.D. ("Hollister"). The second, 3:96cv2148(AHN), is a medical malpractice action brought

by Law, individually and as executor of the estate of Mrs. Law. The defendants in the second action are Greenwich Hospital (the "Hospital"), Frank Corvino, CEO and President of the Hospital, and Bruce Warwick, Chairman of the Hospital's Board of Trustees, James Brunetti, M.D. ("Brunetti"), Mitchell Kline, M.D. ("Kline"), Wei-Nchih Lee, M.D. ("Lee"), (collectively the "Hospital Defendants"), and four other physicians: Dr. Camp, Dr. Hollister, Francis Walsh, M.D. ("Walsh"), and Arthur Rosenberg, M.D. ("Rosenberg").

Presently pending before the court is Law's motion for partial summary judgment in the malpractice action [doc. # 196], the Hospital Defendants' motion for summary judgment in the malpractice action [doc. # 227], Dr. Walsh's and Dr. Rosenberg's motions for summary judgment in the malpractice action [doc. # 262 and doc. # 259], and Dr. Camp's and Dr. Hollister's motions for summary judgment in both actions [doc. # 267 and doc. # 243].

For the following reasons, Law's motion is DENIED. The motions of the Hospital Defendants, Dr. Camp, Dr. Hollister, Dr. Walsh and Dr. Rosenberg are GRANTED.

RELEVANT PROCEDURAL BACKGROUND

Discovery in these cases has been contentious and lengthy. The parties have appeared before Magistrate Judge Holly B. Fitzsimmons on a frequent and routine basis. She has issued numerous discovery rulings, one of which ordered Law to disclose his expert witnesses by December 15, 1998. On December 12, 1998, he disclosed Arthur Kaufman, M.D. ("Kaufman"). On December 14, 1998, he disclosed S. Murphy Vishnubhakat, M.D. ("Vishnubhakat"). On June 3, 1999, the magistrate judge denied Law's request for an extension of time to disclose additional expert witnesses. On June 3, 1999, and November 22, 1999, she ruled that Law

was precluded from designating further expert testimony regarding the standard of care. Nonetheless, on February 2, 2000, Law disclosed Jay B. Krasner, M.D. as a "rebuttal" expert witness. On June 2, 2000, the defendants' motion to preclude the testimony of this witness either in support of or in opposition to summary judgment or trial was granted.

Discovery is now over. Law's previous motion for summary judgment in the fraud action was denied on the ground that there were material issues of fact in dispute.

STANDARD OF REVIEW

A motion for summary judgment may be granted if the court determines that there are no genuine issues of material fact to be tried and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* In considering a Rule 56 motion, the court's responsibility is not to resolve disputed issues of fact, but to assess whether there are any factual issues to be tried, while resolving all ambiguities and drawing all reasonable inferences against the moving party. See *Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986)* (citing *Anderson, 477 U.S. at 248; Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243, 249 (2d Cir. 1985));* see also *Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465 (2d Cir. 1989); Donahue v. Windsor Locks Bd of Fire Comm'rs, 834 F.2d 54, 57 (2d Cir. 1987).* The substantive law governing a particular case identifies the facts that are material. See *Anderson, 477 U.S. at 258.* "A dispute regarding a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992)* (quoting *Anderson, 477 U.S. at 248).*

Summary judgment may be granted only if the pleadings, depositions, answers to interrogatories, and admissions on

file, together with affidavits, if any, show that reasonable minds could not differ as to the material facts. See *Miner v. Glens Falls, 999 F.2d 655, 661 (2d Cir. 1993); Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991); Suburban Propane v. Proctor Gas, Inc., 953 F.2d 780, 788 (2d Cir. 1992).*

FACTS

The following facts are undisputed unless otherwise indicated.

On or about October 19, 1994, Mrs. Law, a 64 year old diabetic, began to note weakness, low grade fever, a nonproductive cough, frequent urination and anorexia and malaise. On October 26, 1994, Mrs. Law was seen by her internist, Dr. Walsh, at his office. She had a low-grade fever and an elevated blood glucose level. Dr. Walsh decided to hospitalize her to control her diabetes and to evaluate the cause of her fever.

At approximately 1:00 p.m. on October 26, 1994, Mrs. Law arrived at the Hospital emergency room. She was evaluated by Dr. Walsh, Dr. Brunetti and a medical resident who is not a defendant in this action. She was diagnosed with a urinary tract infection and elevated blood sugar. She was treated in the emergency room with intravenous saline, insulin and acetaminophen. Dr. Walsh admitted her to the Hospital for treatment of the infection, to look for all other possible sources of infection, and to treat her for possible sepsis. He put her on Unasyn, a broad-based antibiotic, and insulin.

After Dr. Walsh admitted Mrs. Law to the Hospital, he contacted Dr. Hollister by telephone and arranged for him to be Mrs. Law's attending physician because Dr. Walsh was leaving town to attend a meeting.

Dr. Brunetti was in charge of Mrs. Law's care during the night of October 26-27, 1994. At 7:45 a.m. on October 27,

Mrs. Law suffered pulmonary arrest. At 7:48 a.m. she suffered respiratory arrest. Cardiopulmonary resuscitation was performed. After about twenty-five minutes cardiac function was restored. Mrs. Law was intubated and placed on a mechanical ventilator (life support). She was transferred to the ICU in a deep coma. She incurred extensive neurological damage as a result of the arrest. Dr. Brunetti had no further involvement in Mrs. Law's care or treatment after she was transferred to the ICU. Dr. Lee and Dr. Kline, Hospital residents, were involved in the resuscitation and in Mrs. Law's care and treatment in the ICU.

Dr. Camp, chief of neurology at the Hospital, was called in for a neurological consultation. He examined Mrs. Law several times on October 27 and 28. During those two days, Mrs. Law remained in an unresponsive state, with, among other things, fixed, dilated pupils, no response to external stimuli or pinpricks, no purposeful movements, and no blink reflex. Dr. Camp confirmed to Dr. Hollister that Mrs. Law was irreparably brain damaged and irreversibly unconscious, with no hope for neurological recovery.

Dr. Camp met with Mrs. Law's family during the afternoon of October 28. Dr. Hollister and Dr. Lee were present for at least some of the meeting. The facts relating to what was said by Dr. Camp and Dr. Hollister during the meeting relating to Mrs. Law's condition are disputed. Dr. Hollister and Dr. Camp assert that the family was told that Mrs. Law would not recover neurologic function--that her brain was so severely damaged that no significant recovery was possible. Dr. Camp denies that he told the family that Mrs. Law was brain dead and claims that he told them that brain death is not a necessary factor in determining whether to continue life support measures. Dr. Hollister and Dr. Camp both maintain that they asked her family if she had a living will or whether they knew what her wishes would be, and her family indicated that she would not wish to remain in that condition. Law contends that Dr. Camp told the family that

Mrs. Law was brain dead and that the decision to place Mrs. Law on patient-assisted ventilation was based on the family's belief that she was brain dead.

It is, however, an undisputed fact that during the meeting it was decided that Mrs. Law would be removed from the mechanical ventilator and placed on patient-assisted ventilation, by which the machine would breathe for her if she made any attempt to breathe on her own. Thus, if Mrs. Law had no brain function, she would not breathe and would die. Her family was aware that without brain function, Mrs. Law would expire.

At 5:52 p.m. Mrs. Law was removed from the mechanical ventilator. At 6:15 p.m. Mrs. Law died. She was pronounced dead by Dr. Rosenberg, who was called in by the floor nurses to make the pronouncement.

Mrs. Law did not have a living will, health care proxy or other notation regarding her wishes as to life support, and she had never expressed her wishes on this issue to her family or her physicians.

In October, 1994, Corvino was President of the Hospital and Warwick was Chairman of the Board of Trustees. Neither of them were involved in the care and treatment of Mrs. Law, and neither had supervisory responsibility or control over Dr. Camp or Dr. Hollister. In addition, neither of them had responsibility for preparing protocols for determining brain death or establishing policies regarding communications with patients' families.

DISCUSSION

Based on these facts and circumstances, Law filed two separate law suits: one alleging medical malpractice, the other alleging fraud. Law now moves for partial summary judgment in the malpractice action on his claims against the Hospital Defendants, Dr. Hollister and Dr. Camp. Dr. Hollister and Dr. Camp move for summary judgment on all

claims against them in both the malpractice action and the fraud action. Dr. Walsh, Dr. Rosenberg, and the Hospital Defendants also move for summary judgment in the malpractice action.

I. Law's Motion For Partial Summary Judgment

Law maintains that he is entitled to summary judgment in the medical malpractice action against the Hospital Defendants, Dr. Hollister and Dr. Camp on the grounds that these defendants violated the provisions of the Connecticut statute pertaining to the continuation or removal of life support systems, Conn. Gen. Stat. § 19a-540a,[1] and failed to follow the Hospital's brain death protocol.[2] He maintains that the defendants' failure to follow the provisions of the statute and Hospital protocol constitutes negligence per se. Specifically, Law asserts that § 19a-504a establishes a common law duty that prevents removal of life support from a person who has not been determined brain dead according to its procedures, that the Hospital protocol sets forth the only accepted medical standard for determining brain death of patients in the Hospital, and that the defendants breached this duty by removing Mrs. Law's life support without such a determination of death. He further contends that there is no factual dispute as to causation because the removal of life support was the undisputed cause of Mrs. Law's death. Law also asserts that Conn. Gen. Stat. § 19a-571 (the "Removal of Life Support Systems Act"),[3] is not applicable as a defense in this case because Mrs. Law did not have a living will, health care proxy or other advance directive.

In opposition, Dr. Hollister maintains that Law's motion must fail because there is no expert testimony that § 19a-504a establishes the sole standard of care applicable to the removal of life support systems, or that under the applicable standard of care a determination of brain death was required before removing life support. Dr. Hollister

offers expert testimony stating that determination of brain death is not necessary prior to placing a patient in Mrs. Law's condition on patient-assisted ventilation. In addition, his expert also states that Dr. Hollister "did not violate the standard of care with regard to the placement of Mrs. Law on patient-assisted ventilation." Dr. Hollister also contends that Law's summary judgment motion must be denied because he has not offered any expert opinion as to causation, and that such expert testimony is required in a medical malpractice case.

Dr. Camp makes the same arguments as those made by Dr. Hollister--that expert testimony is required in a medical malpractice action to establish the applicable standard of care, a breach of the standard of care and proximate cause. He asserts that Law has not only failed to offer expert testimony to establish these elements, but that Law's own expert witness, Dr. Vishnubhakat, testified that in light of Mrs. Law's condition, she would not have survived the cardiorespiratory arrest she suffered prior to being placed on the mechanical ventilator.

Both Dr. Camp and Dr. Hollister maintain that the Hospital's protocol for determining brain death was not applicable in Mrs. Law's case and that they were not required to, and did not follow its provisions.

The Hospital Defendants maintain that Law's negligence per se claim against them is both factually and legally untenable because they had no involvement in, nor any legal duty with regard to the removal of life support from Mrs. Law. Corvino and Warwick also maintain that they did not have supervisory responsibility or control of either Dr. Camp or Dr. Hollister, and that neither of them had any involvement in preparing the Hospital protocol. These two defendants further maintain that Connecticut law does not impose personal liability on a corporate officer merely because of his official position in the corporation. Finally, all

the Hospital Defendants assert that Law's summary judgment motion is fatally defective because of the absence of the required expert testimony establishing the standard of care, its breach and proximate cause, which is required in medical malpractice actions against hospitals and hospital administrators just as it is required in actions against physicians.

A. Law's Claim of Negligence Per Se

Negligence per se operates to engraft a particular legislative standard onto the general standard of care imposed by traditional tort law principles, i.e., the standard of care of an ordinarily prudent person. To find negligence in a negligence per se case the jury does not have to decide whether the defendant acted as an ordinary prudent person would have acted under the circumstances. It merely determines whether the statute was violated. If it was, then the defendant was negligent as a matter of law. See *Gore v. People's Sav. Bank, 235 Conn. 360, 376, 665 A.2d 1341 (1995).*

There are two necessary elements to a claim of negligence per se. First, the plaintiff must be in the class of persons for whose benefit the statute was enacted. Second, the plaintiff must prove that the violation of the statute, that is, the breach of duty imposed by the statute, was a proximate cause of the injury. See *Rivera v. Fairbank Management Prop., Inc., 45 Conn. Supp. 154, 703 A.2d 808 (1997).* In determining the first element, the inquiry is whether the defendants were guilty of a breach of duty in failing to provide safeguards to prevent the injuries suffered by the plaintiff. See *Hassett v. Palmer, 126 Conn. 468, 12 A.2d 646 (1940).*

Contrary to Law's argument, there is nothing to support his claim that § 19a-504a establishes a legislative standard of care that in all instances governs the medical determination of brain death or a duty of care regarding the removal of life

support systems. Indeed, the statute clearly states that "determination of death shall be made in accordance with accepted medical standards." Conn. Gen. Stat. § 19a-504a. As the Connecticut Supreme Court noted, § 19a-504a reflects the legislature's recognition of the need for a uniform statutory definition by which a hospital may determine brain death to account for the recent advances in medical technology. See *State v. Guess, 244 Conn. 761, 777, 715 A.2d 643 (1998).* The court further noted that the statute expressly provides that the manner of determining death is to be controlled by reasonable medical standards. See id.[4] Moreover, there is nothing in the language of the statute, its legislative history or case law indicating that § 19a-504a was enacted to establish the standard of care for determining brain death. To the contrary, there is every indication that the statute was passed in 1984 to close the gap between modern medical technology, which made possible the artificial prolongation of human life, and the common law definition of death, which required cessation of heart and lung function. Because advances in medical technology made it possible for these bodily functions to continue in the absence of any brain function, a person on a mechanical ventilator would not be legally dead under the common law definition of death. See *Severns v. Wilmington Med. Center, 421 A.2d 1334, 1344 (Del. 1980)* (noting the penumbra created by medical miracles that compel us "to distinguish between death as we have known it, and death in which the body lives in some fashion but the brain . . . does not").

Thus, in response to the ethical, medical and legal dilemma which faced physicians and families in situations where the lives of patients with no hope of recovery could be artificially prolonged because they were not legally dead, legislatures were called on to enact statutes making brain death criteria an alternative legal definition of death. Their efforts resulted in the enactment in Connecticut of § 19a-504a, and, in the majority of other states, in the adoption of

the Uniform Definition of Death Act, 12 U.L.A. 270 (1978), which contains language identical to the Connecticut act. See 27 S. Proc., Pt. 3, 1984 Sess., p. 1081-1082 (remarks of Senator Howard T. Owens, Jr.). There is absolutely no indication that these acts were intended to require a diagnosis of brain death as a condition precedent to cessation of life support. See *Barber v. Superior Court, 147 Cal. App. 3d 1006, 1014, 195 Cal. Rptr. 484 (1983).*

There is also no legal authority to support Law's claim that the Hospital protocol is the only accepted medical standard for determining brain death. Indeed, the Connecticut Supreme Court has held that hospital rules and regulations do not establish the standard of care. See *Van Steensburg v. Lawrence & Mem. Hosp., 194 Conn. 500, 506, 481 A.2d 750 (1984).*

Here, however, the court does not need to determine if § 19a-504a was intended to supplant the traditional and long-standing requirement of establishing the acceptable standard of care and a breach thereof by expert testimony. This is so because Law has not established proximate cause--the nexus between the negligence and Mrs. Law's death--by expert testimony. See e.g., *Buckley v. Lovallo, 2 Conn. App. 579, 582-83, 481 A.2d 1286 (1984).* His failure to do so is dispositive.

B. Proximate Cause

It is axiomatic that the plaintiff in a medical malpractice action has the burden of proving legal causation by expert testimony. See, e.g., *Campbell v. Pommier, 5 Conn. App. 29, 32, 496 A.2d 975 (1975)* ("In Connecticut, both breach of the standard of care and proximate cause must be proved by expert testimony"). No matter how negligent a party may be, if his act does not bear a legal, causal relation to the alleged injury, it is not actionable. See *Esposito v. Schiff, 38 Conn. App. 726, 730, 662 A.2d 1337 (1995).* Even under the doctrine of negligence per se, the plaintiff must prove that the

statutory violation was the legal cause of the claimed injury. See *Zuchowicz v. United States, 140 F.3d 381, 389 (2d Cir. 1998);* see also *Shelnitz v. Greenberg, 200 Conn. 58, 509 A.2d 1023 (1986); Aspiazu v. Orgera, 205 Conn. 623, 535 A.2d 338 (1987).* Proximate cause does not exist merely because there is "but for" cause or cause in fact. See *Stewart v. Federated Dept. Stores, Inc., 234 Conn. 597, 605-06, 662 A.2d 753 (1995).*

In order for legal causation to exist, there must be both actual cause and proximate cause. See *Shegog v. Zabrecky, 36 Conn. App. 737, 745, 654 A.2d 771 (1995).* Actual cause requires evidence that the injury would not have occurred in the precise way it did without the defendant's conduct. See id. Proximate cause is defined as actual cause that is a substantial factor in the resulting harm. See id. (citing *Doe v. Manheimer, 212 Conn. 748, 757, 563 A.2d 699 (1989)).* "The meaning of the term 'substantial factor' is so clear as to need no expository definition. . . . Indeed, it is doubtful if the expression is susceptible of definition more understandable than the simple and familiar words it employs." *Mather v. Griffin Hosp., 207 Conn. 125, 130, 540 A.2d 666 (1988)* (quoting *Pilon v. Alderman, 112 Conn. 300, 301, 152 A. 157 (1930)).*

To establish proximate cause in a medical malpractice action, the plaintiff must adduce evidence to a reasonable degree of medical probability that it is more likely than not that the injury claimed to have resulted from the alleged negligence was a substantial factor in causing the injury, and that without the alleged negligence, the injury would not have occurred. See *Borkowski v. Sacheti, 43 Conn. App. 294, 301, 682 A.2d 1095 (1996).* Where a preexisting condition is involved, the plaintiff must prove that the victim of the alleged negligence more likely than not would have survived if there had been no negligence. See *id. at 302, 209-10* (acknowledging that Connecticut recognizes the traditional approach to the lost chance doctrine in medical malpractice

actions). Thus, if the victim probably would not have survived, the proximate cause of death would be the preexisting condition, not the defendant's alleged negligence. See id. There are numerous cases in which removal of life support was found, as a matter of law, to not constitute probable cause of death where there was a preexisting condition. See *State v. Guess, 44 Conn. App. 790, 800, 692 A.2d 849 (1997);* see also *McConnell v. Beverly Enterprises-Connecticut, Inc., 209 Conn. 692, 553 A.2d 596 (1989)* (agreeing with the majority of jurisdictions that have addressed the issue and holding that the removal of life support is not the "death producing agent").

Expert medical opinion is generally required in all medical malpractice cases to establish the proximate cause of an injury "because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person." *Shegog v. Zabrecky, 36 Conn. App. at 745-46* (citing *Aspiazu v. Orgera, 205 Conn. 623, 631, 535 A.2d 338 (1987)); Grody v. Tulin, 170 Conn. 443, 449, 365 A.2d 1076 (1976)).* A narrow exception to the general rule requiring expert opinion to establish proximate cause in a medical malpractice case exists where the plaintiff's evidence creates a probability so strong that a lay jury can form a reasonable belief without it, see *Esposito v. Schiff, 38 Conn. App. at 730,* or where the physician's negligence is so gross as to afford an almost conclusive inference of causation, see *Puro v. Henry, 188 Conn. 301, 305, 449 A.2d 176 (1982).*

Here, Law offers no expert opinion to establish that the defendants' alleged negligence was a proximate cause of Mrs. Law's death. He merely asserts that causation is not an issue because it is undisputed that Mrs. Law was not brain dead before the life support was removed and that she died as a result of its removal. Law's failure to adduce the required expert opinion as to causation is fatal to his claim. See e.g., *Stowe v. McHugh, 46 Conn. App. 391, 699 A.2d 279 (1997)*

(noting that summary judgment is appropriate where plaintiff lacks expert testimony to establish probable cause in a medical malpractice action); *Vinchiarello v. Kathuria, 18 Conn. App. 377, 381, 558 A.2d 262 (1989)* (affirming directed verdict where plaintiff did not present any evidence that the defendant's negligence was the proximate cause of death).

This is not one of the rare cases where causation is within the ken of a lay person. To the contrary, whether Mrs. Law could have survived the severe anoxic ischemic insult and the cardiorespiratory arrest is far from the sphere of a lay person's common knowledge. In any event, Law's own medical expert, Dr. Vishnubhakat, states that Mrs. Law "absolutely" could not have survived the initial cardiorespiratory arrest she suffered before she was put on the mechanical ventilator. Moreover, the defendants have submitted expert testimony stating that their alleged negligent acts were not the proximate cause of Mrs. Law's death.

Accordingly, because Law has no expert testimony to establish that the proximate cause of Mrs. Law's death was the removal of life support, and because the expert opinions of both his expert and the defendants' expert establish that she would not have survived the cardiorespiratory arrest she suffered before being placed on the mechanical ventilator, Law's motion for summary judgment must be denied.

II. Defendants' Motions For Summary Judgment

Dr. Walsh, Dr. Rosenberg and the Hospital Defendants move for summary judgment in the medical malpractice action. Dr. Hollister and Dr. Camp move for summary judgment in both the malpractice and fraud actions.

A. Dr. Walsh's Motion

Law's claims against Dr. Walsh are that he failed to properly diagnose the severity of Mrs. Law's infection and

was negligent in leaving her in the care of an unqualified and inexperienced intern. He alleges that Dr. Walsh's negligence caused Mrs. Law to suffer respiratory arrest, cardiac arrest and a comatose state.

Dr. Walsh maintains that summary judgment must be granted in his favor because Law has not provided expert testimony concerning the applicable standard of care and his deviation therefrom, and also has not produced a doctor qualified to provide expert testimony pursuant to Conn. Gen. Stat. § 52-184.

In opposition, Law submits a report of Jay B. Krasner, M.D. ("Dr. Krasner"), which he offers as a "rebuttal" witness. He maintains that Dr. Krasner's testimony demonstrates that there are material facts in dispute which preclude summary judgment. However, in prior rulings of this court Dr. Krasner's report and testimony have been precluded. Thus, his opinions and testimony can not be considered in opposition to any of the defendants' motions for summary judgment.[5] Accordingly, Law does not have any expert testimony to support his malpractice claims against Dr. Walsh. This lack of evidence is fatal to his claims.

As previously noted, under Connecticut law a plaintiff must establish through expert testimony: (1) the applicable standard of care, (2) the defendant's breach of that standard, and (3) that the breach proximately caused the injury. See e.g., *Pisel v. Stamford Hosp., 180 Conn. 314, 334-42, 430 A.2d 1 (1991).* Summary judgment is appropriate where it is evident that the plaintiff cannot produce such expert testimony. See *Guzze v. New Britain Gen. Hosp., 16 Conn. App. 480, 484-85, 547 A.2d 944 (1988);* see also *Stowe v. McHugh, 46 Conn. App. 391, 699 A.2d 279 (1997).*

Here, Law has two expert witnesses: Dr. Kaufman and Dr. Vishnubhakat. Dr. Kaufman is a hospital administrator. He has no opinion regarding the care given to Mrs. Law by Dr. Walsh. Similarly, Dr. Vishnubhakat also has no opinion

as to whether Dr. Walsh deviated from the standard of care. Moreover, neither of these expert witnesses are experienced or board certified in Dr. Walsh's specialty, internal medicine. See Conn. Gen. Stat. § 52-184c (requiring expert witnesses to be similar healthcare providers).

Thus, Law has no evidence to support his malpractice claim against Dr. Walsh. Moreover, as previously noted, this is not a case where the alleged negligence is so great that it permits an inference of negligence without such evidence. Accordingly, Dr. Walsh's motion for summary judgment is granted.

B. Dr. Hollister's & Dr. Camp's Motions

Law alleges in counts three, five and seven of the malpractice action that Dr. Hollister was negligent in failing to properly diagnose and treat Mrs. Law and in leaving her in the care of an inexperienced and unqualified intern. He also asserts a claim against Dr. Hollister for failing to keep Mrs. Law's family informed of her condition, count six, and in count fourteen, that he violated Conn. Gen. Stat. § 19a-571 by failing to continue life support. Law alleges in count eleven of the malpractice complaint that Dr. Camp erroneously diagnosed Mrs. Law as brain dead and that this led to the removal of life support, which caused her death.

Dr. Hollister and Dr. Camp make the same arguments as those made by Dr. Walsh: that Law's failure to adduce expert testimony as to the standard of care, breach and proximate cause is fatal to a claim of medical malpractice. Thus, for the same reasons Dr. Walsh's motion should be granted, Dr. Hollister's and Dr. Camp's motions for summary judgment on counts three, five, seven and eleven should also be granted.[6]

With regard to counts six and fourteen in the malpractice action against Dr. Hollister, the absence of expert evidence establishing that his alleged failure to keep Mrs. Law's family

informed and his failure to continue life support proximately caused her death, is also dispositive.

As previously discussed, expert opinion is generally required in all medical malpractice actions to establish that the alleged negligence was a proximate cause of the injury. See e.g., *Shegog v. Zabrecky, 36 Conn. App. 737, 745-46, 654 A.2d 771 (1995).* Here, Law has absolutely no evidence that Dr. Hollister's alleged failure to keep Mrs. Law's family informed of her condition was a substantial factor in causing her death. He also has no competent evidence that Mrs. Law more likely than not would have survived if the life support system had not been discontinued. Because evidence of probable cause is lacking, Law can not prevail on his claims against Dr. Hollister in counts six and fourteen. See *Wei Ping Wu v. Town of Fairfield, 204 Conn. 435, 441, 528 A.2d 364 (1987).*

Dr. Hollister and Dr. Camp are also entitled to summary judgment in the fraud action because Law has no evidence that Mrs. Law was not brain dead when life support was removed and that its removal was the proximate cause of Mrs. Law's death.[7]

Law's expert, Dr. Vishnubhakat, testified that he could not state to a reasonable degree of medical certainty that Mrs. Law was not brain dead before life support was removed. Thus, there is no evidence to support two of the required elements of a fraud claim: that the alleged statement was false, and that the fraud was the proximate cause of damages.

The necessary elements of a cause of action in fraud are: (1) that a false representation was made as a statement of fact; (2) that the statement was untrue and known to be untrue by the party making it; (3) that the statement was made to induce the other party to act on it; and (4) the other party relied on the statement to his detriment. See *Rizzo Pool Co. v. DelGrosso, 232 Conn. 666, 683, 657 A.2d 1087 (1995).* The plaintiff has the burden of proving all of these

elements of fraud by clear, precise and unequivocal evidence. See *Bound Brook Ass'n v. City of Norwalk, 198 Conn. 660, 666, 504 A.2d 1047 (1986).*

In addition, in order to recover for fraudulent misrepresentation, a plaintiff must allege injury that is the direct and proximate result of the alleged misrepresentation. See *Chanoff v. U.S. Surgical Corp., 857 F. Supp. 1011, 1017 (D. Conn. 1994).* "The damages to be recovered . . . [must be] the natural and proximate consequence of the fraudulent representation complained of. . . ." *Kilduff v. Adams, Inc., 219 Conn. 314, 323-24, 593 A.2d 478 (1991).* Damages resulting from fraudulent misrepresentations need only be proved by a preponderance of the evidence. See *id. at 330.*

As previously discussed, proximate cause is more than "but for" causation. "In addition to showing that but for defendant's alleged misrepresentations plaintiff would not have suffered his asserted damages, plaintiffs must also show that the misstatements were the reason plaintiff suffered these damages." *Johnson v. Chesebrough-Pond's USA Co., 918 F. Supp. 543, 548 (D. Conn. 1996).* When factors other than the defendant's fraud are an intervening direct cause of a plaintiff's injury, the same injury can not be said to have occurred as a reason of the defendant's actions. *See id.* (quoting *First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 769 (2d Cir. 1994)).*

Here, factors other than the doctors' alleged fraud were the intervening direct and proximate cause of the injury. Thus, even if Law can prove "but for" the misrepresentation, the alleged injury would not have occurred, there is no evidence that the alleged misrepresentation was the proximate cause of Mrs. Law's death and Law's emotional distress. To the contrary, the court has previously found that there is no evidence that the alleged injury would not have occurred if life support had not been discontinued. Thus, even if Dr. Camp and Dr. Hollister intentionally misinformed

Law that Mrs. Law was brain dead, summary judgment on Law's fraud claim is appropriate because he has no evidence that the misrepresentation was the proximate cause.

C. Dr. Rosenberg's Motion

In count thirteen of the malpractice action, Law alleges that Dr. Rosenberg "failed to reverse the termination of life support procedures when he knew or should have known that [Mrs. Law] was not brain dead." The undisputed facts supporting this allegation are that Dr. Rosenberg was called to Mrs. Law's bedside by the nurses to pronounce her dead at 6:15 p.m.

Dr. Rosenberg moves for summary judgment on the grounds that Law has no expert testimony to prove that he breached the applicable standard of care and that the breach was a proximate cause of Mrs. Law's death. He contends that he was not involved in the decision to remove life support and did not see Mrs. Law prior to her death.

In opposition, Law maintains that there is a genuine factual dispute as to whether Dr. Rosenberg saw Mrs. Law alive and that this factual dispute precludes summary judgment. Law relies on Mrs. Law's death certificate, in which Dr. Rosenberg certifies: "I last attended the deceased from Oct. 26 94 to Oct. 28 94, and last saw him/her alive on Oct. 28 94." Law maintains that this evidence supports his claim that Dr. Rosenberg was Mrs. Law's attending physician and was involved in Mrs. Law's care, and that he could have prevented or reversed the removal of life support.

However, even if the death certificate creates a factual dispute as to Dr. Rosenberg's involvement in Mrs. Law's care and the removal of life support, it is not a material one that precludes summary judgment. This is because, as previously discussed, Law has no evidence that Dr. Rosenberg's actions or inactions were the proximate cause of Mrs. Law's death.

Accordingly, summary judgment in Dr. Rosenberg's favor is warranted.

D. The Hospital Defendants' Motion

The claims against the Hospital Defendants are contained in counts two, four, five, six, seven, nine and twelve. Specifically, Law alleges that the emergency room personnel who evaluated Mrs. Law failed to diagnose the severity of her condition, that Dr. Brunetti, a Hospital intern, failed to understand, diagnose and treat Mrs. Law's condition and failed to inform or misinformed other physicians and Hospital personnel of his actions or lack of actions during the early morning hours of October 27, 1994, that the Hospital, Corvino and Warwick were negligent in leaving the care and treatment of Mrs. Law to an unqualified and inexperienced intern who was unable to evaluate and treat her condition, that the Hospital Defendants failed to inform Mrs. Law's family of the nature and cause of her condition, that Dr. Lee and Dr. Kline, also Hospital residents, failed to diagnose Mrs. Law's infection and septic shock and failed to properly treat this condition, that the Hospital, Corvino and Warwick failed to have proper, qualified personnel on duty and failed to record all information which caused delay in providing proper treatment for Mrs. Law, and that Warwick and Corvino failed to have a proper and failsafe protocol for determining brain death.

The Hospital Defendants maintain that summary judgment should be granted because Law has no expert testimony to establish the standard of care, breach and proximate cause and that expert testimony is required in malpractice actions against a hospital just as it is required in other malpractice cases. See *Logan v. Greenwich Hosp. Ass'n, 191 Conn. 282, 304, 465 A.2d 294 (1983); Buckley v. Lovallo, 2 Conn. App. 579, 582-83, 481 A.2d 1286 (1984).* They maintain that neither the testimony of Dr. Kaufman, Law's hospital administration expert, nor Dr. Vishnubhakat,

his neurological expert, is sufficient to establish liability. In particular, they assert that Dr. Kaufman stated at his deposition that he had no opinion as to the negligence of Dr. Brunetti, Dr. Lee, and Dr. Kline and that his opinion only dealt with the Hospital, not the individual doctors. In addition, the Hospital Defendants point out that Dr. Vishnubhakat also had no opinion as to whether they complied with the applicable standard of care or whether there was a causal nexus between their acts and Mrs. Law's death. The Hospital further asserts that Dr. Kaufman, even though his opinion deals with the standard of care for hospitals, has no opinion as to whether the Hospital's administrative negligence caused the alleged harm.

Dr. Kaufman's report states that the Hospital and its agents and employees failed in their duty to Mrs. Law and that their failure bore a direct relationship to her death. Specifically, he asserts that Dr. Walsh breached his duty to Mrs. Law when he left the hospital and placed her care in Dr. Hollister's hands without directly communicating with him. It is his opinion that this breach caused Mrs. Law to receive a lesser level of care from the hospital staff as opposed to care from an attending physician. In his opinion the inexperienced care by residents resulted in the patient not being managed in the ICU, and in not having an infectious disease specialist called in a timely manner. Dr. Kaufman further states that the nurses who observed Mrs. Law failed to appreciate her progressive deterioration and consequently did not call the attending physician in a timely manner. He concludes that their failures compounded those of the house staff and were directly and proximately related to the patient's demise.

Notwithstanding these assertions in his written report, Dr. Kaufman testified that he was not prepared to render an opinion as to how the Hospital's deviation from the standard of care resulted in any change in the patient's outcome other than "it didn't do her any good." He also stated that causation was a clinical issue and that because he was not a clinician,

he was not offering any opinion on clinical issues. Thus, because Law's expert witnesses do not have any opinion as to whether the Hospital's negligence caused Mrs. Law's death, Law's claims against the Hospital must also fail.

Warwick and Corvino also maintain that their motion for summary judgment must be granted as a matter of law because they were not personally involved in the care and treatment of Mrs. Law. They also contend that they can not be held personally liable under a theory of corporate negligence merely because of their positions as officers and directors of the Hospital. See *DeSantis v. Piccadilly Land Corp., 3 Conn. App. 310, 316, 487 A.2d 1110 (1985); Campisano v. Nardi, 212 Conn. 282, 288, 562 A.2d 1 (1989).* The court agrees.

Under the doctrine of corporate negligence, liability is imposed where a corporation's officers and directors, as opposed to ordinary employees, fail to maintain the standard of care required of the particular corporation. See *Buckley v. Lovallo, 2 Conn. App. at 582.* Expert testimony is, however, required to sustain such a claim against a hospital. Neither Dr. Kaufman nor Dr. Vishnubhakat had an opinion as to the negligence of Warwick and Corvino.

Finally, there is no merit to Law's claims regarding the Hospital's failure to establish or insure that its brain death protocol was followed. Not only does Law fail to offer any evidence that this was the proximate cause of Mrs. Law's death, it is well settled that a "hospital's rules, regulations and policies do not themselves establish the standard of care." *Van Steensburg v. Lawrence and Mem. Hosp., 194 Conn. 500, 506, 481 A.2d 750 (1984).* While the failure to follow such rules or policies may be evidence of negligence, see id., expert testimony that the negligence was the proximate cause of the alleged injury is required for liability. See *Petriello v. Kalman, 215 Conn. 377, 382, 576 A.2d 474 (1990).* Thus, merely because there is a hospital policy, the hospital is not

legally obligated to guarantee that the policy is followed. See *id. at 386.*

CONCLUSION

For the foregoing reasons, Law's motion for partial summary judgment in the malpractice action [doc. # 196] is DENIED. The Hospital Defendants' motion for summary judgment in the malpractice action [doc. # 227] is GRANTED. Dr. Camp's motion for summary judgment in both actions [doc. # 267] is GRANTED. Dr. Hollister's motion for summary judgment in both actions [doc. # 243] is GRANTED. Dr. Walsh's motion for summary judgment in the malpractice action [doc. # 262] is GRANTED. Dr. Rosenberg's motion for summary judgment in the malpractice action [doc. # 259] is also GRANTED. The Clerk is directed to close these cases.

SO ORDERED this 26 day of July, 2000 at Bridgeport, Connecticut.

Alan H. Nevas

United States District Judge

Footnotes

[1] Conn. Gen. Stat. § 19a-504a, "Continuation or removal of life support system. Determination of death," provides:

> (a) For the purpose of this section, "life support system" means any mechanical or electronic device utilized by any medical facility in order to replace, assist or supplement the function of any human vital organ or combination of organs.
>
> (b) For purposes of making a determination concerning the continuation or removal of any life support system in a general hospital licensed under section 19a-491, an individual

> who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. Determination of death shall be made in accordance with accepted medical standards.

[2] The Hospital's determination or brain death protocol provides, in pertinent part: "1. The attending physician will assume responsibility for sharing with the family the matter of apparent brain death, when in his/her clinical judgment the patient has no possibility of recovery. . . 2. If the family verbally agrees to accept the attending physician's judgment of apparent brain death, it will be explained that two physicians each of which must be a neurosurgeon or neurologist, must be called in to establish the diagnosis of brain death and to record their opinion in the medical record. . . c.l. The attending physician will document on the patient's record appropriate discussion with the family and their compliance with the attending physician's clinical judgment. . . ."

[3] Conn. Gen. Stat. § 19a-571, "Liability re removal of life support system of incapacitated patient. Consideration of wishes of patient" provides, in relevant part:

> (a) Subject to the provisions of subsection (c) of this section, any physician licensed under chapter 370 or any licensed medical facility who or which withholds, removes or causes the removal of a life support system of an incapacitated patient shall not be liable for damages in any civil action or subject to prosection in any criminal proceeding for such withholding or removal provided, (1) the decision to withhold or remove such life

support system is based on the best medical judgment of the attending physician in accordance with the usual and customary standards of medical practice, (2) the attending physician deems the patient to be in a terminal condition or, in consultation with a physician qualified to make a neurological diagnosis, who has examined the patient, deems the patient to be permanently unconscious; and (3) the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems. In the determination of the wishes of the patient, the attending physician shall consider the wishes as expressed by a document executed in accordance with sections 19a-575 and 19a-575a, if any such document is present to, or in the possession of, the attending physician at the time the decision to withhold or terminate a life support system is made. If the wishes of the patient have not been expressed in a living will the attending physician shall determine the withes of the patient by consulting any statement made by the patient directly to the attending physician and, if available, the patient's health care agent, the patient's next of kin, the patient's legal guardian or conservator, if any, and any other person to whom the patient has communicated his wishes, if the attending physician has knowledge of such person...

(b) A physician qualified to make a neurological diagnosis who is consulted by the attending physician pursuant to subdivision (2) of subsection (a) of this section shall not be liable for damages or subject to criminal

prosecution for any determination made in accordance with the usual and customary standards of medical practice.

[4] There is also nothing to support negligence per se under Conn. Gen. Stat. § 19a-571. The only logical construction of this statute is that it was enacted to implement a terminal patient's common law rights to self determination and privacy, see *McConnell v. Beverly Enterprises-Conn., Inc., 209 Conn. 692, 553 A.2d 596 (1989),* and, by its express terms, to provide a safe harbor for physicians by insulating them from civil and criminal liability for discontinuing life support measures under certain specified circumstances. There is no merit to Law's contention that the court should apply the inferential maxim "*expressio unius est exclusio alterius*" which allows an inference that, where a statute identifies lawful behavior, by exclusion it identifies what is unlawful.

[5] On four separate occasions, the court has precluded the report and testimony of Dr. Krasner. Most recently, on June 15, 2000, the court ruled that "Plaintiff may not use Dr. Krasner's expert report or testimony in support of, or in opposition to, summary judgment or at trial in plaintiff's case-in-chief." Law v. Camp, No. 3:96CV2147(AHN), Ruling on Defendants' Motion To Preclude Additional Expert Testimony, (D. Ct. June 2, 2000) (Doc. # 304).

[6] Dr. Hollister and Dr. Camp also maintain that summary judgment must be granted on Law's claims in his individual capacity because he has not alleged a cognizable injury. Dr. Hollister also moves for summary judgment on count fourteen on the alternative theory that Conn. Gen. Stat. § 19a-571 does not create a private cause of action. Because summary judgment is appropriate for Law's failure to adduce

expert testimony, the court need not address these alternative arguments.

[7] Law submits Mrs. Law's death certificate, which states that she was pronounced dead at 6:15 p.m., is evidence that she was not dead when the doctors told her family that she was. Even if this was sufficient to create a triable issue of fact as to whether Mrs. Law was not dead when the doctors told her family that she was, the claim is still untenable because Law can not establish that the alleged misrepresentation was the proximate cause of her death.

00-9031

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES A. LAW, individually and as Executor of the Estate of Janice C. Law and JAMES A. LAW,
Plaintiff-Appellant,

-v.-

WALTER A. CAMP, MD, BRUCE L. WARWICK, FRANK A. CORVINO, MITCHELL KLINE, WEI-NCHIH LEE, GREENWICH HOSPITAL, FRANCIS X. WALSH, MD, ARTHUR ROSENBERG, JAMES BRUNETTI,
Consolidated-Defendants-Appellees,

DICKERMAN HOLLISTER, JR., MD,
Defendant-Appellee,

Filed October 5, 2001

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant James Law.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

Supreme Court, U.S.
FILED
JAN 25 2002
CLERK

No. 01-920

In The

Supreme Court of the United States

JAMES A. LAW, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JANICE C. LAW AND JAMES A. LAW,

Petitioner,

v.

WALTER CAMP, M.D., BRUCE L. WARWICK, FRANK A. CORVINO, MITCHELL KLINE, WEI-NCHIH LEE, GREENWICH HOSPITAL, FRANCIS X. WALSH, M.D., ARTHUR ROSENBERG, M.D., JAMES BRUNETTI AND DICKERMAN HOLLISTER, JR., M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF RESPONDENTS WALTER A. CAMP, M.D., FRANCIS X. WALSH, M.D., ARTHUR ROSENBERG, M.D. AND DICKERMAN HOLLISTER, JR., M.D.

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QUESTIONS PRESENTED FOR REVIEW

1. The Second Circuit Court of Appeals affirmed the District Court's granting of summary judgment in favor of Respondents in this medical malpractice action, because Petitioner did not timely produce the expert testimony required by Connecticut law on the applicable standard of medical care, breach of that standard, and causation of damages. Should the Supreme Court review the application of well-settled state law to Petitioner's medical malpractice action?

2. The Second Circuit Court of Appeals affirmed the District Court's denial of Petitioner's Motion for Partial Summary Judgment – premised on the theory that Connecticut General Statutes Section 19a-571 established a legislative standard of care, such that a failure to follow the statute amounted to *negligence per se* – because Petitioner presented no legislative history and no case law to support this theory. Moreover, Petitioner could not show by expert testimony that violation of the statute proximately caused the damages he claimed. Should the Supreme Court review this interpretation of well-settled state law, even where overturning such an interpretation would not change the outcome of the case because Petitioner cannot prove causation?

3. Petitioner did not raise a constitutional challenge to Connecticut General Statutes Section 19a-571 in the lower Courts, and neither of the lower Courts premised their decisions on the statute. Should the Supreme Court undertake a constitutional review of the statute for the first time in this case, even where a decision that the statute is unconstitutional would not change the outcome because the lower Court's decisions turned on Petitioner's failure to timely disclose expert witnesses to support his malpractice claims?

PARTIES TO THE PROCEEDING

This Brief in Opposition to Petitioner James Law's Petition for a Writ of Certiorari is submitted by Respondents Dickerman Hollister, Jr., M.D., Francis X. Walsh, M.D., Walter Camp, M.D., and Arthur Rosenberg, M.D. Several of the remaining parties to the proceeding have also submitted a separate brief, but will, along with Drs. Hollister, Walsh, Camp and Rosenberg, be referred to collectively herein as "Respondents."

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STATEMENT OF THE CASE

Petitioner filed these consolidated medical malpractice actions against nine doctors, a hospital, and the hospital's Chairman of the Board and its President, claiming that Respondents were negligent in the care and treatment of his mother. Petitioner also alleged that various Respondents falsely informed him during a lengthy family meeting that his mother was "brain-dead," thereby fraudulently inducing his consent to removal of life-sustaining measures. Respondents denied the allegations, several of them invoking a special defense under Connecticut General Statutes Section 19a-571, a statute granting immunity to physicians who follow its terms in these situations.

Under well-settled Connecticut law, Petitioner was required to prove each element of his claims through expert testimony. Despite the passage of years and numerous discovery deadlines, Petitioner failed to disclose even one expert that would testify that Respondents had breached the applicable standard of care or that any treatment given by Respondents caused his alleged damages.[1] As a result, Respondents filed Motions for Summary Judgment, on the grounds that Petitioner could not prove any of the elements of his case with the requisite expert testimony, which the District Court granted. *See Law v. Camp*, 116 F. Supp. 2d 295 (D. Conn. 2000). The District Court also denied Petitioner's Partial Motion for Summary Judgment, in which he made the novel claim

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[1] Petitioner's discovery foibles are well detailed in the District Court's opinion. *Law v. Camp*, 116 F. Supp. 2d 295, 299 (D. Conn. 2000).

that Respondents were *negligent per se* because they failed to follow the terms of Connecticut General Statutes Sections 19a-504 and Connecticut General Statutes Section 19a-571.[2]

The District Court rejected that claim, and further found that Petitioner's failure to produce expert testimony as to causation would render his argument ineffectual even if it were correct. *Id.* at 304 & n.4. Importantly, the District Court never reached the issue of whether Respondents were immune from suit under Section 19a-571.

---

[2] Only Connecticut General Statutes Section 19a-571 is at issue here. The statute provides, in relevant part,

> [A]ny physician . . . who . . . withholds, removes or causes the removal of a life support system of an incapacitated patient *shall not be liable for damages in any civil action*, provided (1) the decision to withhold or remove such life support system is based on the best medical judgment of the attending physician in accordance with usual and customary standards of medical practice; (2) the attending physician deems the patient to be in a terminal condition or, in consultation with a physician qualified to make a neurological diagnosis who has examined the patient, deems the patient to be permanently unconscious; and (3) the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems. If the wishes of the patient have not been expressed in a living will the attending physician shall determine the wishes of the patient by consulting any statement made by the patient directly to . . . the patient's next of kin . . . (Emphasis added).

In a Summary Order, the Second Circuit affirmed the District Court's decision in its entirety based on the Petitioner's failure to timely produce expert testimony in support of his malpractice claim. *See Law v. Camp*, 15 Fed. Appx. 24 (2nd Cir. 2001). In doing so, the Court further rejected Petitioner's argument, *raised for the first time on appeal*, that the Fourteenth Amendment prohibited the removal of life support systems, because Petitioner failed entirely to present any evidence of the requisite state action. *Id.* at 26. Additionally, after the submission by Respondents of the voluminous legislative history of Connecticut General Statutes Section 19a-571 – *which demonstrated beyond peradventure that the legislature intended to create a safe harbor for physicians participating in removal of life-sustaining treatment, not a private right of action or a legislative standard of care* – the Second Circuit adopted the reasoning of the District Court on Petitioner's *negligence per se* claim. *Id.* at 27.

REASONS FOR DENYING THE PETITION

This is a case about Petitioner's failure to present the expert testimony necessary to prove a medical malpractice case. There is no dispute that Petitioner failed to timely produce expert testimony to support his claims of malpractice. In an attempt to circumvent this basic requirement of Connecticut law, Petitioner tried to transform Connecticut General Statutes Section 19a-571, by its clear terms an immunity statute, into a legislative standard of care governing cessation of life sustaining measures. Petitioner claimed unsuccessfully at the District Court that a failure to follow the statute's terms was

negligence per se, obviously in the hope that he would avoid the need for an expert as to the applicable standard of care and breach thereof. Petitioner's appeal to the Second Circuit also turned on that specious argument.[3]

The Second Circuit upheld the District Court by applying bedrock state law principles, nothing more. Under Supreme Court Rule 10, review of these decisions, absent some other basis, is simply not warranted. *See Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 395 (1988) (The Supreme Court rarely reviews a construction of state law agreed upon by the two lower federal courts).

Moreover, as the District Court correctly noted, because Petitioner failed to present expert testimony on causation, he could not prevail even if his distorted interpretation of Section 19a-571 were correct. *See Law*, 116 F. Supp. 2d at 306. The question presented in the Petition is therefore entirely abstract, because it would not change the outcome of the case. Even if Connecticut General Statutes Section 19a-571 were held to set a legislative standard of care, a breach of which amounted to *negligence per se*, Petitioner presented no expert to testify that such a breach proximately caused his mother's death.[4] Accordingly, the issue is hypothetical and not a proper basis for certiorari.

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[3] Petitioner also appealed several of the District Court's discovery rulings, which are not a part of this Petition.

[4] Petitioner seizes on a phrase used in one of Respondents' briefs – that removal of life support systems "only hastened a result that was, by anyone's measure, inevitable" – as an admission of causation. Argument of counsel is, of course, not evidence, and cannot make up for what Petitioner lacked in

The remainder of Petitioner's arguments are a similarly futile attempt to create a federal issue out of the interpretation and application of state law. For example, Petitioner now appears to claim for the first time in this case and without meaningful analysis that Connecticut General Statutes Section 19a-571 is unconstitutional. Petitioner misses the mark because neither the Second Circuit nor the District Court relied upon the statute as a basis for granting summary judgment, making the constitutionality of the statute irrelevant. Moreover, Petitioner misinterprets this Court's decisions in *Vacco v. Quill*, 521 U.S. 793 (1997) and *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) when he claims that the Second Circuit's decision conflicts with them. Those decisions are

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evidence and legal precedent; but taken in its fuller context, the phrase has a different and more nuanced meaning than Petitioner ascribes:

> "The conclusion is inescapable: Mrs. Law had been rendered in a terminal condition by hypoxic encephelopathy suffered as a result of a cardiorespiratory arrest. She would have died from the condition. The removal of life support here only hastened a result that was, by anyone's measure, inevitable. The removal of life support, as in [*State v. Guess*, 44 Conn. App. 790, 800, 692 A.2d 849 (1997), *aff'd*, 244 Conn. 761, 715 A.2d 643 (1998)] and [*McConnell v. Beverly Enterprises-Connecticut, Inc.*, 209 Conn. 692, 710, 553 A.2d 596 (1989)] was not the proximate cause of Mrs. Law's demise. Brief of Appellee, Dickerman Hollister, M.D., at 16.

Respondent's position – that Connecticut courts had long held that removal of life support systems could not be considered the proximate cause of death in a patient rendered in a terminal condition by some pre-existing medical condition or pathology – is not an admission of causation or of any willful act.

entirely consistent with, although irrelevant to, the outcome here.

Petitioner's claim that the Second Circuit's decision "sets a national rule that eliminates the need for physicians and hospitals to abide by the statutory requisites of removal of life support statutes," Petition, at p. 6, also lacks merit. The issue upon which summary judgment was granted was Petitioner's failure to present adequate expert witnesses. The District Court's application of state law regarding disclosure of experts and a Second Circuit decision affirming it scarcely set a "national rule," particularly where a Summary Order is not to be formally cited as authority. *See* Rule 0.23, Local Rules of the Second Circuit.

Further, the facts in this case reflect a terminal patient whose life support was removed with the consent of the family. The decision allowed the patient's condition to proceed to its foregone conclusion rather than to hold that conclusion in abeyance.[5] It has no application whatsoever to "euthanasia or physician-committed homicide." It also has nothing to do with acting without consent. In fact, the Petition is glaringly devoid of any connection between the constitutional rights claimed therein and the decisions of the District Court and the Second Circuit. This is because the issue was not raised below. Neither court dealt with the Petitioner's decedent's right to live

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[5] In fact, life support systems were not "removed" in this case. More accurately, the decedent was placed on "patient-assisted ventilation," which was designed to allow the patient to breathe if she exhibited any brain function at all. *See Law,* 116 F. Supp. 2d at 301.

or die or even the right to remove life support. Both courts dealt with the necessary proof in a malpractice case and its absence. The distinction is of great importance: there is no federal or constitutional issue in this case to be decided by the Supreme Court.

For the reasons set forth herein, Respondents respectfully assert that there are no compelling issues that require review by this Honorable Court, and respectfully urge the Court to deny the Petition for Writ of Certiorari.

ARGUMENT

I. Even If It Were Timely Raised, The Fourteenth Amendment Is Inapplicable To This Case.

The Second Circuit correctly concluded that the Fourteenth Amendment had no application to this case, because Petitioner offered no evidence that Respondents were anything but private actors, to which the Fourteenth Amendment does not apply. *Law*, 15 Fed. Appx. at 26. Given the lack of state action, further review is unnecessary.[6]

[6] Petitioner failed to raise this argument at the District Court, thereby waiving his right to make it for the first time on appeal. The Second Circuit, however, addressed the issue on its merits, ostensibly because it was easily decided given the complete lack of state action. *Law*, 15 Fed. Appx. at 26.

II. The Constitutionality of Connecticut General Statutes Section 19a-571 Was Not Raised Below And Is Irrelevant To The Outcome Here.

As a general matter, an argument not advanced below, and not forming the basis upon which a decision is rendered, is not appropriate for consideration by the Supreme Court. *See Holly Farms v. NLRB*, 517 U.S. 392, 400 n.7 (1997). Petitioner never raised the claim that Connecticut General Statutes Section 19a-571 was unconstitutional at any level of the proceedings below. (And for good reason, since such an argument was incongruous with Petitioner's invoking of the statute as a basis for a *negligence per se* theory.) More importantly, Respondents prevailed not because of the protection afforded by the statute but because of Petitioner's lack of expert testimony. Therefore, even if his argument here is adequately raised – which it is not – the constitutionality of the statute is entirely irrelevant, as it was not the basis upon which the lower Courts' decisions rested and would not change the outcome of this case.

III. The Second Circuit's Decision Does Not Conflict With Prior Decisions Of This Court.

Petitioner's claim that the Second Circuit's decision conflicts with this Court's decisions in *Vacco v. Quill*, 521 U.S. 793 (1997) and *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) is not justified because this case simply does not have constitutional import. In *Cruzan*, the Court dealt with an attempt by health surrogates to *compel a state hospital* to cease life-sustaining measures given to an incompetent. *Cruzan*, 497 U.S. at 265. The case

had nothing to do with a medical malpractice claim that life-support had been negligently terminated by private actors (especially where there was no expert testimony to support such a claim).

The health surrogates in *Cruzan* challenged the State of Missouri's attempt to impose a "clear and convincing" evidentiary standard when considering the wishes of an incompetent whose surrogate seeks a cessation of life-sustaining treatment. *See Cruzan*, 497 U.S. at 278-81. The Court decided that the Fourteenth Amendment did not prevent the State from imposing such a standard. The Court did not decide that the Constitution *requires* a state to impose a clear and convincing evidentiary standard, or any other standard, to a statutory process authorizing removal of life-support systems. Even if it had, there is no evidence in this case that there is a single process, statutory or otherwise, that governs removal of life-sustaining measures by private actors in Connecticut.

The Court's decision in *Vacco* is also irrelevant to this case. It does not address the need for experts in a state-law based medical malpractice action. It does not enumerate any rule of law applicable to the removal of life sustaining-measures that took place in this case, nor could it, since the actors were private. Rather, in *Vacco*, the Court held that the State of New York could outlaw a process known as "assisted suicide" without impinging on fundamental constitutional rights or unfairly singling out a suspect class of persons. *See Vacco*, 521 U.S. at 799-800. Nothing in the *Vacco* decision has specific application to the situation or to the private actors here.

To the extent that the Court's decisions in *Cruzan* and *Vacco* have some reach beyond the specific facts of each case, there is nothing in those opinions that conflicts with the results reached here. Both recognize the right of a patient, competent or not, to refuse life-sustaining treatment, whether personally or through a health care surrogate or next-of-kin. *See, e.g., Cruzan*, 497 U.S. at 278-285. The Court in *Cruzan* acknowledged that many states had established "substituted judgment procedures" which utilize varying standards for determination of the patient's wishes. *Id.* at 284-85. And in *Vacco*, the Court recognized that there was a fundamental and widely recognized distinction between "assisting suicide and withdrawing life-sustaining treatment," a distinction consistent with the result reached here. *See* 521 U.S. at 800-01. As Chief Justice Rehnquist wrote:

> The distinction [between cessation of life-sustaining treatment and assisted suicide] comports with fundamental principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.

Id. at 801.

Here, the District Court recognized, based on testimony from Respondents' and Petitioner's experts, that the decedent suffered an irreparable brain injury due to cardiorespiratory arrest, a "terminal condition" that would cause her death notwithstanding the extraordinary life-sustaining measures prescribed by Respondents. *See, e.g., Law*, 116 F. Supp. 2d at 306. The District Court further

concluded from the evidence that all parties were aware that, without brain function, cessation of those life-sustaining measures would undoubtedly result in her death. These facts, and the actions taken by Respondents in response to them, were fully consistent with the principles enunciated in *Vacco* and *Cruzan*. *See Vacco*, 521 U.S. at 807 (*citing Cruzan*, 497 U.S. at 278, for the proposition that "this Court has also recognized . . . the distinction between letting a patient die and making a patient die."). Any assertion from Petitioner that, based on the *Cruzan* and *Vacco* cases, allowing decedent in this case to die was tantamount to "involuntary euthanasia" or "physician-committed homicide" is utterly disingenuous.

IV. Petitioner's Claim that the Second Circuit "Grossly Misinterpreted" Connecticut General Statutes Section 19a-571 Is Incorrect, Irrelevant, And Should Not Be Addressed By This Court.

After considering hundreds of pages of briefs, consulting extensive legislative history, and entertaining lengthy oral argument, the District Court declined Petitioner's invitation to transform Connecticut General Statutes Section 19a-571 into a legislative standard of care capable of supporting a *negligence per se* claim. *Law*, 116 F. Supp. 2d at 303-304. The Second Circuit adopted the District Court's analysis on this issue after similar consideration. Both decisions reached the only conclusion justified by well-settled Connecticut case law and by the clear intent of the legislature. Without referencing any supporting case law or legislative history, Petitioner now asks the Court to grant certiorari to second-guess the Second Circuit's interpretation of state law, a role unsuited for this

Honorable Court. *See Stenberg v. Carhart*, 530 U.S. 914, 940 (2000); *American Booksellers Ass'n, Inc.*, 484 U.S. at 395.

Perhaps more importantly, even if Petitioner prevails on this claim, his victory is Pyrrhic, for he cannot change the outcome given the lack of expert testimony on causation. *Law*, 116 F. Supp. 2d at 305; *Shegog v. Zabrecky*, 36 Conn. App. 737, 745-466, 54 A.2d 771 (1995). As such, any decision by this Court would be merely hypothetical. Further review by this Court is not only unnecessary but inappropriate. *See Steel Company v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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No. 01-920

IN THE
Supreme Court of the United States

JAMES A. LAW, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JANICE C. LAW AND JAMES A LAW,

Petitioner,

v.

WALTER A. CAMP, M.D., BRUCE L. WARWICK, FRANK A. CORVINO, MITCHELL KLINE, WEI-NCHIH LEE, GREENWICH HOSPITAL, FRANCIS X. WALSH, M.D., ARTHUR ROSENBERG, JAMES BRUNETTI, AND DICKERMAN HOLLISTER, JR., M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS GREENWICH HOSPITAL, BRUCE L. WARWICK, FRANK A. CORVINO, MITCHELL KLINE, WEI-NCHIH LEE, AND JAMES BRUNETTI

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18 pp

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals for the Second Circuit properly affirmed the district court's granting of the hospital defendants' motion for summary judgment on the medical malpractice and corporate negligence claims pursuant to Connecticut law?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondent, Greenwich Hospital, provides as follows:

Greenwich Hospital is a Connecticut non-stock corporation whose affairs are managed by a self-perpetuating Board of Trustees. There is no parent or publicly held company that owns 10 percent or more of the corporation's stock.

The sole member of Greenwich Hospital is Greenwich Health Care Services, Inc., a Connecticut non-stock corporation.

The affairs of Greenwich Health Care Services, Inc. are managed by a self-perpetuating Board of Directors.

The sole member of Greenwich Health Care Services, Inc. is Yale-New Haven Health Service Corporation, a Connecticut non-stock corporation (governed by a self-perpetuating Board of Directors).

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STATEMENT OF THE CASE

This brief in opposition to the petition for a writ of certiorari is submitted on behalf of the respondents, Greenwich Hospital, Frank Corvino, CEO and President of Greenwich Hospital, Bruce Warwick, Chairman of Greenwich Hospital's Board of Trustees, James Brunetti, M.D., Mitchell Kline, M.D., and Wei-Nchih Lee, M.D., (collectively the "hospital defendants").

The following are additional facts or clarifications of statements in the petition for a writ of certiorari.

This matter is a medical malpractice action brought by the plaintiff Law against the hospital defendants as well as defendants, Dr. Walter A. Camp, Dr. Francis X. Walsh, Dr. Arthur Rosenberg and Dr. Dickerman Hollister. The allegations of the complaint directed to the hospital defendants consisted of claims of medical malpractice and/or corporate negligence. *Law v. Camp*, 116 F. Supp.2d 295, 309 (D. Conn. 2000). The hospital defendants moved for summary judgment due to the failure of Law to set forth the requisite expert testimony as to standard of care, breach and proximate cause. *Id.* In opposition to the hospital defendants' motion for summary judgment, and in support of petitioner's cross motion for partial summary judgment, Law limited his argument to a claim of negligence per se regarding the removal of life support systems.

The only claim alleged against the hospital defendants that involves the issue of life support systems was the corporate negligence claim asserted against hospital defendants, Greenwich Hospital, Corvino and Warwick, alleging a failure to have a proper and fail-safe

protocol for determining brain death. *Law v. Camp*, 116 F. Supp. 2d at 309. There simply never have been any claims regarding life support status directed to hospital defendants Brunetti,[1] Lee, and Kline[2]. *Id.* As such, the only claim actually alleged against the hospital defendants which involved the issue of life support had nothing to do with the negligence per se claim argued below and is not even remotely related to the petitioner's hypothetical question presented in the petition for a writ of certiorari.

On July 26, 2000, the district court granted the hospital defendants' motion for summary judgment due to the failure of Law to proffer the requisite expert testimony as to standard of care, breach and/or proximate cause. *Law v. Camp*, 116 F. Supp. 2d at 310. As to hospital defendants Corvino and Warwick, the district court also granted summary judgment on the basis of the absence of personal liability under a theory of corporate negligence. *Id.*[3] The district court denied Law's motion for partial summary judgment premised upon a claim that the defendants had violated the provisions of Connecticut General Statutes

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[1] The petitioner never moved for partial summary judgment as to the hospital defendant Brunetti.

[2] Despite the obvious lack of interest of the hospital defendants in the outcome of the petition for a writ of certiorari, petitioner failed to provide the requisite notice pursuant to Rule 12.6 of the Rules of the Supreme Court of the United States.

[3] This independent basis for the granting of summary judgment in favor of hospital defendants Corvino and Warwick was not challenged on appeal to the United States Court of Appeals for the Second Circuit and is not an asserted basis in the petition for a writ of certiorari. This is further evidence of the obvious lack of interest in the outcome of the petition for a writ of certiorari by hospital defendants Corvino and Warwick.

Sections 19a-504 and 19a-571.[4] The district court denied petitioner's claim of negligence per se without expressly deciding whether said statutes were intended to set forth a legislative standard of care, and the court expressly holding that there was an absence of the requisite expert testimony regarding causation. *Id.* at 303-04.

The court of appeals for the second circuit affirmed the order of the district court denying Law's motion for partial summary judgment and granting the hospital defendants' motion for summary judgment on the malpractice claims and corporate negligence claims for substantially the reasons stated in Judge Nevas's thorough opinion. The court of appeals also rejected petitioner's Fourteenth Amendment claim due to the absence of the requisite State action. On October 5, 2001, the court of appeals denied the petitioner's petition for rehearing en banc.

REASONS FOR DENYING THE PETITION

The sole question presented by this petition is whether expert testimony is required as to standard of care, breach and proximate cause in a medical malpractice or corporate negligence claim against physicians, hospitals and administrators under Connecticut law. This case presents nothing other than State law issues that have been definitively and consistently decided by the State of

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[4] The petition for a writ of certiorari is based solely on the provisions of Connecticut General Statutes Section 19a-571.

Connecticut Supreme Court. Consequently, as demonstrated below, there is no compelling reason to grant the petition.

Petitioners argue that the court of appeals' opinion holds that Connecticut General Statutes Section 19a-571 allows for physician assisted intentional hastening of death in violation of the Fourteenth Amendment and in conflict with the decisions of this Court in the cases of *Cruzan v. Mo. Dept. of Health*, 497 U.S. 261 (1990) and *Vacco v. Quill*, 521 U.S. 793 (1997). Petitioners inarticulately argue that Connecticut General Statutes Section 19a-571 is unconstitutional under the Fourteenth Amendment as allowing for the intentional hastening of a patient's death by a physician.

Neither the court of appeals' actual ruling, nor the record below, raise the question attempted to be presented by the petition. In fact, there was no claim whatsoever of a violation of the Fourteenth Amendment made in the district court. The Fourteenth Amendment claim that was attempted to be asserted to the court of appeals was not that Connecticut General Statutes Section 19a-571 is unconstitutional as allowing for the intentional hastening of a patient's death, but rather, that the Fourteenth Amendment mandated that there be compliance with Connecticut General Statutes Section 19a-571 in the removal of life support.

In addition, the petition is flawed as being premised on petitioner's misstatement of fact as to whether any evidence whatsoever was presented to the courts below that

the removal of life support[5] did anything other than to let a patient die. In fact, it was the dearth of expert causation testimony between the removal of life support and the patient's death that was the basis for the decisions of the courts below.

In sum, petitioners are attempting to "create" a "federal case" that was not presented to the courts below. The case presented below was and is nothing more than a State court malpractice claim involving nothing other than issues of well settled State law. The court of appeals' ruling was proper in all respects, and respondents respectfully urge this Honorable Court to deny the petition for writ of certiorari.

A. Neither the Record Nor the Decision Below Raises the Question Presented by the Petition

The general rule is that this Court does not decide questions not raised or involved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). An argument not advanced below and not forming the basis of the decision below is generally not addressed by the Supreme Court. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400 n.7 (1996). A further related principle is that an argument inadequately preserved will not be considered by the Supreme Court. *Auer v. Robbins*, 519 U.S. 452, 464 (1997). As set forth below, respondents contend that the aforesaid general rules should be applied here.

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[5] Although phrased as the removal of life support, in actuality the mechanical ventilator was not removed, but was placed on patient-assisted ventilation, by which the machine would breathe for the patient if she made any attempt to breathe on her own. *Law v. Camp*, 116 F. Supp. 2d at 301.

The case below, as it involved the hospital defendants, involved the issue of whether the failure to proffer expert medical testimony as to standard of care, breach and causation rendered claims of medical malpractice and/or corporate negligence insufficient as a matter of law. In the face of the admitted absence of expert testimony as to the above, petitioner argued that Connecticut General Statutes Section 19a-571 could be used to engraft a legislative standard of care on the hospital defendants with regard to the removal of life support. Rather than arguing that the statute was unconstitutional, petitioner argued that the defendants had violated the statute and, therefore, he had established liability.

The issue actually decided by the courts below is that claims of medical malpractice and/or corporate negligence under Connecticut law will fail in the absence of expert testimony that the alleged conduct was a proximate cause of the claimed injury. *Law v. Camp*, 116 F. Supp. 2d at 305, 310. This proposition is boilerplate Connecticut law and hardly involves a novel issue of State law. *See Zuchowicz v. United States*, 140 F.3d 381, 389 (2d Cir. 1998).

The petition for certiorari is further improper in that it is premised upon the incorrect assertion that evidence was presented below that the removal of life support resulted in the intentional hastening of a patient's death. As noted by the district court, petitioner offered no expert opinion to establish that the defendants' alleged negligence was a proximate cause of Mrs. Law's death. In addition to the absence of such testimony, the district court relied upon Connecticut law, holding that the removal of life support is not a proximate cause of death. *Law v. Camp*, 116 F. Supp.

2d at 304; *see McConnell v. Beverly Enterprises – Connecticut, Inc.*, 209 Conn. 692, 710, 553 A.2d 596, 605 (1989) (where the patient is in a terminal condition, removal of life support systems is not the "death-producing agent.")

Not only was the constitutionality of Connecticut General Statutes Section 19a-571 not presented to the courts below, the decisions of such courts were not based upon the statute the petitioner now wishes to challenge. The district court, as affirmed by the court of appeals, held that it did not need to rely upon the statute to determine the matter as petitioner had failed to establish that there was any causal connection between the claimed negligence and the death. *Law v. Camp*, 116 F. Supp. 2d at 304. As such, the issue petitioner asserts herein was not presented to the courts below and did not form the basis for the courts' decisions.

Moreover, the Fourteenth Amendment claim that petitioner asserts herein was not raised at all before the district court. Further, the only mention of the Fourteenth Amendment before the court of appeals was not that Connecticut General Statutes Section 19a-571 is unconstitutional, but rather that the Fourteenth Amendment required that there be compliance with the State statute in order to remove life support systems.

Any assertion that the Fourteenth Amendment justifies the granting of the petition for certification is misplaced given the absence of the requisite State action at any level of the proceedings. Despite not being appropriately raised and preserved before the district court, the court of appeals addressed this claim by appropriately

denying same in the absence of State action. The claim that petitioner attempts to put forth not only was not presented to the courts below, but would not have been capable of presentation given the absence of State action.

The opinion of the court of appeals is much less complex and far reaching than petitioner makes it out to be. The courts below simply held on a settled matter of State law. The holding was proper in all respects and does not call for review by this Court.

B. The Second Circuit's Ruling Does Not Conflict with Either *Cruzan v. Mo. Dept. of Health* or *Vacco v. Quill*

Petitioner's claim that certiorari is warranted because the decision of the court of appeals conflicts with those of this Court in the cases of *Cruzan v. Mo. Dept. of Health*, 497 U.S. 261 (1990) and *Vacco v. Quill*, 521 U.S. 793 (1997). This claim is devoid of merit.

Petitioner's argument of conflict is premised on the misstatement as to the issues presented and decided by the courts below. As set forth above, the question of whether Connecticut General Statutes Section 19a-571 permits the intentional hastening of a patient's death in violation of the Fourteenth Amendment was not, and could not, be presented. As set forth above, this claim factually and legally was not presented or decided by the courts below.

In both *Cruzan* and *Vacco*, this Court was confronted with State action and constitutional challenges to State statutes. In *Cruzan* v. *Mo. Dept. of Health*, 497 U.S. at 269-285, this Court held that the United States

Constitution did not forbid Missouri to require that evidence of an incompetent's wishes as to the withdrawal of life–sustaining treatment be proved by clear and convincing evidence. This Court held that the liberty interest to refuse unwanted medical treatment embodied in the Fourteenth Amendment was not violated by the procedural requirement by the State of Missouri. *Id.* at 280-285.

Petitioner's apparent claim of inconsistency with the decision in *Cruzan* v. *Mo. Dept. of Health* is additionally without merit as being based on an incorrect interpretation of this decision as somehow constitutionally mandating certain procedural requirements in State statutes addressing the withdrawal of life support.

Similarly, petitioner's argument of inconsistency of the decision of the court of appeals with *Vacco v. Quill*, 521 U.S. 793, is misplaced. In *Vacco v. Quill*, 521 U.S. at 799-809, this Court held that a New York statute making it a crime to aid another to commit or attempt suicide was not violative of the Equal Protection Clause of the Fourteenth Amendment. In so holding, this Court held that the distinction between letting a patient die and making a patient die was important, logical, rational, well established and comported with fundamental legal principles of causation. *Id.*

Petitioner's claim of inconsistency with the decision in *Vacco v. Quill* is also premised on an incorrect interpretation of the decision of the court of appeals. The decision of the court of appeals in no way addressed the Equal Protection distinction addressed by the *Vacco* case.

In sum, the decision of the court of appeals is a decision involving questions of State law that in no way involves, let alone conflicts, with the decisions of this Court. The petitioner's claims to the contrary are based on a flawed interpretation of the decisions of this Court as well as the decision of the court of appeals.

C. The Decision of the Second Circuit Involves the Interpretation of State Law and There Is No Compelling Reasons Warranting the Grant of the Petition

The petitioner urges as a basis for the granting of the petition for a writ of certiorari that the courts below misinterpreted the provisions of Connecticut General Statutes Section 19a-571 so as to justify the granting of the petition. This claim is legally untenable.

As with the other bases of the petition, this claim is likewise premised on a basic lack of understanding of the nature of the case below. Neither the district court nor the court of appeals expressly determined whether Connecticut General Statutes Section 19a-571 established a legislative standard of care, the breach of which would constitute negligence per se. Consequently, neither court below expressly determined whether there was compliance with the statute's provisions. Rather, the courts below, relying on long established principles of Connecticut law, held that there was an absence of the requisite expert testimony regarding proximate cause to sustain medical malpractice and/or corporate negligence claims.

The case at bar, therefore, does not involve far reaching issues of Federal law, but rather represents the genre of cases where a construction of State law was agreed upon by the two lower courts. In such circumstances, review by petition for a writ of certiorari is rarely appropriate. *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). This is particularly true, where as here, the issue involved is one of boilerplate State law.

The decisions of the district court and the court of appeals were premised on the dearth of expert testimony as to standard of care, breach and/or causation in a medical malpractice and corporate negligence case. The decisions of the courts below are nothing more than consistent interpretations of State law that have no import beyond the parties and circumstances of this case.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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No.

Supreme Court, U.S.
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In the

Supreme Court of the United States

JAMES A. LAW, individually and as Executor of the Estate of JANICE C. LAW and JAMES A. LAW,
Petitioner,

v.

WALTER A. CAMP, MD, BRUCE L. WARWICK, FRANK A. CORVINO, MITCHELL KLINE, WEI-NCHIH LEE, GREENWICH HOSPITAL, FRANCIS X. WALSH, MD, ARTHUR ROSENBERG, JAMES BRUNETTI and DICKERMAN HOLLISTER, JR., MD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

I. The Respondents' Objections To The Petition For Writ Of Certiorari Provide No Reason Why The Petition Should Not Be Granted.

The respondents' briefs indicate that Janice C. Law's hastening of death by removal of life support was not the proximate cause of her death because respondents argue that in the case of *McConnell v. Beverly Enterprises-Connecticut, Inc., 209 Conn. 692, 553 A.2d 596 (1989)* the Connecticut Supreme Court had held that removal of life support systems could not be considered the proximate cause of death in a patient rendered in a terminal condition by some pre-existing medical condition or pathology. Respondents' erroneous conclusion and interpretation of the law of the State of Connecticut in *McConnell* was reached because respondents failed to recognize that in *McConnell* there was no violation of the Section 19a-571 requisites that required the expressed wishes of the patient concerning removal of life support. Therefore the physicians and hospital in *McConnell* did not breach their duty to Mrs. McConnell. Without a breech of duty a physician or hospital cannot be found negligent. Mrs. McConnell's removal from life support was done in accordance with the law of the State of Connecticut since "the trial court found clear and convincing evidence that Mrs. McConnell had expressed 'forcefully and without wavering' that artificial means should not be employed to prolong her life." *McConnell v. Beverly Enterprises-Connecticut, Inc. 209 Conn. 692, 553 A.2d 596 (1989).* Therefore Mrs. McConnell's death was in fact from her genuine expression of her right to refuse unwanted medical treatment/right to self-determination.

In the case at bar the District Court found that "Mrs. Law did not have a living will, health care proxy or other notation regarding her wishes as to life support, and she had never expressed her wishes on this issue to her family or her physicians" *Law v. Camp, 116 F.Supp.2d 295 (D.Conn. 2000)* (App. 14a). Therefore life support was not removed in

accordance with the law of the State of Connecticut. Section 19a-571 requires "the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems" *Connecticut General Statute Section 19a-571.* Therefore in the case of Janice C. Law, the case at bar, the removal of life support became the instrument of homicide and the proximate cause of her death. The removal of life support to hasten death is an inescapable conclusion that there is a causal connection between the removal of life support and the death of Janice C. Law. When the physicians and hospital hastened the death of Janice C. Law by the removal of life support the causal connection between the illegal removal of life support and the death of Janice C. Law is established.

The intentional hastening of Janice C. Law's death without her consent fulfills the narrow exception to the general rule requiring expert opinion to establish proximate cause in a medical malpractice case where the plaintiff's evidence creates a probability so strong that a lay jury can form a reasonable belief without it, see *Esposito v. Schiff, 38 Conn.App. 726, 662 A.2d 1337* or where the physician's negligence is so gross as to afford an almost conclusive inference of causation, see *Puro v. Henry, 188 Conn. 301, 449 A.2d 176 (1982).*

As stated by Justice Learned Hand in *The T.J. Hooper (1932, CA2 NY) 60 F2d 737, 740, cert den 287 US 662, 77Led 571, 53 S Ct 220:*

> "In most cases reasonable prudence is in fact common prudence: but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."

II. Consent Of Family Not Required

The respondents' argument that the family consented to the removal of life support is incorrect and inapplicable. The District Court's opinion indicated that there was a question of fact concerning what the family was told as to Mrs. Law's condition and its relation to removal of life support. But the consent of the family was not what made the removal of life support in *McConnell* legal. In 1989 at the time of *McConnell* the consent of the family in addition to the clear and convincing evidence of the express wishes of the patient as to life support removal was required. When Section 19a-571 was amended in 1991 the family consent requirement was removed from the statute. Therefore, as was always the case, the clear and convincing evidence of the expressed wishes of the patient as to the removal of life support were required to make the removal of life support under this statute legal.

III. Requirement Of More Than Accepted Care

A right to self-determination would never justify, and is in fact antithetical to, involuntary euthanasia. It would be a profound sacrilege to this right for a person's life ever to be taken involuntarily by another. Indeed, it was precisely the importance of ensuring that such a decision be the individual's own that led this Court in *Cruzan*, addressing the case of a women in a vegetative state who was no longer competent, to permit the State "to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements." *Cruzan v. Director, Missouri Dept. of Public Health, 497 U.S. 261(1990)*

The courts, as neutral arbiters of disputes between physician and patient, reserve the right to hold as a matter of law that the physician did not act as a reasonably prudent physician should have under the circumstances presented. This is so, regardless of how other members of the profession would have acted. Such cases are rare, but the option to reach such a result where necessary to avoid injustice seems both wise and necessary.

Setting the physician's duty of care to his patient in reference to accepted or ordinary medical practice standards may not be sufficient safeguard to the patient. Such a standard allows physicians to set the standards by which their conduct will be judged. What a good, prudent physician would do in the circumstances may strongly suggest what should be done in treating a patient. However, it should not be conclusive. It may not be synonymous with legal medical care.

For whatever reason, prevailing standards of accepted medical care may be inadequate. As a result, the fact that the doctor acted in accordance with ordinary, accepted, prevailing or average medical practice may not be enough. Liability may still be imposed if the court determines reasonable prudence required more.

Standards of the medical profession, as those of any other profession, are in the last analysis to be measured by the courts. It may be that the prevailing standards of practice are negligent.

IV. A Society Is Ultimately Judged By The Way It Treats Its Most Vulnerable Citizens.

Janice C. Law was incapacitated and unable to speak or act for herself. The respondents have asked this Court to believe that the State of Connecticut through Section 19a-571 has given to those with the power to heal a license to kill by claiming that Section 19a-571 is only an immunity statute.

The respondents in the case at bar exploited Janice C Law's right to refuse unwanted medical treatment, commonly referred to as the right to die. The respondents hastened her death by removal of life support under a statute which would provide immunity if its requisites were followed. The respondents did not follow these requisites. Many states, as did Connecticut, by their statutes grant to physicians the power to remove life support to exercise a patient's right to self-determination/refusal of unwanted medical treatment.

The District Court and the Second Circuit have allowed this power to be exploited and by so doing are granting permission for involuntary euthanasia or physician-committed homicide. If the decision in *Law v. Camp, 116 F. Supp.2d 295 (D.Conn. 2000)* is allowed to stand the most vulnerable citizens of this nation will be subjected to this unjustified deprivation of life. The final authoritative voice of this Court is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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